TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 233

NAOMI PETTY, ADMINISTRATRIX OF THE ESTATE OF FAYE R. PETTY, DECEASED, PETITIONER,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, A CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,878.

Civil.

NAOMI PETTY, Administratrix of the Estate of Faye R. Petty, Deceased, Appellant,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, SOUTHEASTERN DIVISION

STIPULATION AS TO RECORD ON APPEAL

It is stipulated by and between the parties hereto that the record on appeal shall consist of the following:

(1) Complaint.

(2) Motion to Dismiss for improper venue and Motion to Dismiss account immunity for tort action with annexed affidavit marked Exhibit "A".

(3) Evidence at hearing on defendant's (appellee's) Motion to Dismiss.

(4) Memorandum opinion and order of the District Judge, dated July 12, 1957, dismissing Complaint.

(5) Notice of Appeal.

(6) Relevant docket entries in the United States District Court.

(Signed) Douglas MacLeod, Attorney for Appellant.

Ward and Reeves, Attorneys for Appellee.
By (Signed) James M. Reeves, One of Said Attorneys.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 10990 (2) Harper, J.

NAOMI PETTY, Administratrix of the Estate of Faye R. Petty, Deceased, Plaintiff,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation, Defendant.

COMPLAINT—Filed December 7, 1956

Count I.

I.

Plaintiff Naomi Petty, was by order of the County Court of Lake County, Tennessee, dated July 13, 1956, appointed Administratrix of the Estate of Faye Petty, deceased, a married man and a resident of Tiptonville, Tennessee, who died on July 8, 1956, leaving surviving him a widow, Naomi Petty, and a minor child, Terry Gene Petty, a boy aged nine, and no others.

II.

Plaintiff seeks to enforce on behalf of herself as a widow, and on behalf of her minor son any rights of action for death, which may exist in their favor under and by virtue of 46 U. S. Code 688, commonly known as the Jones Act.

III.

The deceased Faye Petty was at the time of the things and matters complained of herein, a seaman and a member [fol. 3] of the crew of the motor vessel or tug ELINOR D. and the ferry barge HELM which was in its tow.

IV.

Defendant Tennessee-Missouri Bridge Commission is, and at the time of the things and matters complained of herein was, a body corporate and politic duly organized and existing under law, having been created by joint action of the legislatures of the States of Tennessee and Missouri under authority of an Act of Congress known as the General Bridge Act of 1946 in the year 1949, with, among others, the power to sue and be sued.

V.

The defendant at all times herein mentioned owned and operated in interstate commerce the Motor Vessel ELINOR D together with its ferry barge HELM as a ferry for the use and convenience of the public for a charge, traveling between the States of Missouri and Tennessee, across the Mississippi River, with one terminus of its route in the vicinity of Tiptonville, Tennessee, and the other in the vicinity of Portageville, Missouri.

VI.

On or about July 8, 1956, the deceased, while in the course of his employment as a deck-hand on the above named ferry, tug and barge, and while the same was en route across the Mississippi River from its terminal point in Missouri to its terminal point in Tennessee, at a point in or near the navigation channel, was caused to be trapped in the pilot house of the sinking tug and to be drowned, as a result of a collision between the aforesaid ferry and the Motor Vessel CAPE ZEPHYR, and its tow of barges, which were proceeding upstream, all due in whole or in part to the negligence of the defendant, its officers, agents and employees.

VII.

The deceased Faye Petty was at the time of the casualty aforementioned, thirty-one (31) years of age with a life [fol. 4] expectancy of 34.63 years according to the American Experience Table, and in good health, earning approxi-

mately $3500.00 per year; while the widow, Naomi Petty, was at the time of the casualty, twenty-seven (27) years of age, with a life expectancy exceeding that of her husband's at the time of his death, and their only minor child was nine (9) years of age on November 25, following the casualty; both widow and minor child were totally dependent upon deceased and are now in a destitute condition as a result of his death.

VIII.

The widow and the minor child have suffered grave pecuniary loss as a result of the death of Faye Petty in the total amount of Ninety Nine Thousand Nine Hundred Ninety Nine Dollars and Ninety Nine Cents ($99,999.99).

Wherefore, plaintiff demands judgment against the defendant under this Count I of her Complaint in the amount of Ninety Nine Thousand Nine Hundred Ninety Nine Dollars and Ninety Nine Cents ($99,999.99), together with her costs.

Plaintiff Demands Trial by Jury of Count I.

Count II.

IX.

Plaintiff realleges all the facts set out in Count I herein and seeking to enforce on behalf of the estate all rights existing in favor of the deceased Faye Petty, against the defendant for personal injuries including conscious pain and suffering arising out of the casualty in question, under and by virtue of the Jones Act, previously referred to, alleges further that by virtue of the premises the deceased Faye Petty, as a result of being trapped inside the sinking vessel, carried on a desperate struggle to free himself and to escape prior to being over-come by water, and in the course of his activity he suffered great mental pain and anguish all to his damage in the sum of Nine Thousand Nine Hundred Ninety Nine (sic) and Ninety Nine Cents ($9,999.99).

[fol. 5] Wherefore, plaintiff demands judgment against the defendant under this Count II of her Complaint in the

further sum of Nine Thousand Nine Hundred Ninety Nine Dollars and Ninety Nine Cents ($9,999.99), together with her costs.

Plaintiff Demands Trial by Jury of Count II.

(Signed) Fred Robertson, 221 Church Street, Tiptonville, Tennessee,

(Signed) W. M. Miles for Miles and Miles, Old National Bank Building, Union City, Tennessee,

(Signed) Douglas MacLeod, 722 Chestnut Street, St. Louis, Missouri, Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

[Title Omitted]

Motion to Dismiss for Improper Venue and Motion to Dismiss Account Immunity for Tort Action—Filed December 28, 1956

MOTION TO DISMISS FOR IMPROPER VENUE

Comes now the defendant in the above-entitled cause and moves the Court to dismiss this action and to quash [fol. 6] the Summons and Return of the Marshal thereon, the jurisdiction of this Court being invoked solely on the ground that the action arises under the Constitution and Laws of the United States and the defendant being a body politic created by the Legislatures of Tennessee and Missouri, the Act of the Missouri Legislature being contained in Sections 234.360 to 234.420, inclusive, R. S. Mo. 1949, and the Acts of the Tennessee Legislature being contained in Chapters 167 and 168 of the Public Acts of 1949, and approved by an Act of the Congress of the United States, being public Law 411 of the 81st Congress, Chapter 758, for the following reasons, to-wit:

1—Because under the Acts of the Legislatures and Congress aforesaid the defendant is not a resident of this Division of this Court, and the defendant has never done business and is not authorized to carry on its business in this Division of this Court, but defendant is a resident and is carrying on its business as authorized by the Acts aforesaid within the jurisdiction of the Southeastern Division of this Court, and consequently the venue of this cause is not in this Division but the same is in the Southeastern Division of the Eastern Judicial District of Missouri.

2—Because the Business office and the Headquarters of the defendant is located in Caruthersville, Pemiscot County, Missouri, outside of the jurisdiction of this Division of this Court, and being located in the Southeastern Division of the Eastern Judicial District of Missouri, all of which is more definitely shown by the affidavit of J. F. Patterson, Secretary and General Manager of defendant, attached hereto and marked Exhibit "A".

3—Because the Summons was issued out of this Division of this Court and was served on E. L. Spence, Chairman of defendant, in Dunklin County, Missouri, which is outside of this Division of this Court, but is within the jurisdiction of the Southeastern Division of this Court.

4—Because all of the Commissioners of the defendant provided by the Acts of the Legislatures and the Act of Congress aforesaid are residents of Pemiscot County, [fol. 7] Missouri, or counties adjacent thereto, and Dyer County, Tennessee, or counties adjacent thereto, all being citizens and residents of Missouri and Tennessee outside of the jurisdiction of this Division of this Court.

Wherefore, defendant prays that this cause be dismissed and that the Summons and Return of the Marshal thereon be quashed on account of improper venue.

MOTION TO DISMISS ACCOUNT IMMUNITY FOR TORT ACTION

In the event the above and foregoing motion is denied by the Court, then in the alternative, the defendant respect-

fully shows to the Court that it is an immediate agency and arm of the sovereign states of Tennessee and Missouri and of the Federal Government by reason of the Acts of the Legislatures and the Act of Congress set up and pleaded in defendant's motion to dismiss and to quash to Summons and Return of the Marshal thereon hereinabove pleaded and set out, reference to which is hereby made and incorporated herein as a part of this motion, and by reason of which this defendant is a creature of the States of Tennessee and Missouri and of the United States, whose sole powers and duties are to plan, construct, maintain and operate a bridge at or near Caruthersville and ferries across the Mississippi River within a radius of 25 miles of Caruthersville, Missouri, as an agency of Tennessee, Missouri and the United States, and pay for the same by tolls, and the title thereto to become vested in the States of Tennessee and Missouri when the costs thereof have been paid, and, by reason of which facts this defendant is not liable to the plaintiff for the matters and things set up and pleaded in the Complaint for the following reasons, to-wit:

1—Because this action is essentially a suit against the States of Tennessee and Missouri, which cannot be maintained in the Courts of the United States, or any other Courts.

2—Because this action is in substance and effect one against the states of Tennessee and Missouri, without consent, over which neither the judicial power of the [fol. 8] United States or the States of Tennessee or Missouri extends.

3—Because this is a suit against an agency created by the sovereign states of Tennessee and Missouri, approved by an Act of Congress, and suits of this class are not permitted by the Constitution and Laws of the States of Tennessee and Missouri, or either of them, and this defendant is immune and not liable in damages in suits of this class.

4—Because this Court has no jurisdiction over the person of this defendant, or the subject matter of this action.

Wherefore, defendant moves that plaintiff's Complaint be dismissed.

Ward & Reeves, Caruthersville, Missouri, Attorneys for Defendant,
By: (Signed) James M. Reeves, One of Said Attorneys.

Certificate of service (omitted in printing).

[fol. 9]

EXHIBIT "A"—AFFIDAVIT

COUNTY OF PEMISCOT)
) ss
STATE OF MISSOURI)

J. F. Patterson, being duly sworn, upon his oath says that he is Secretary and General Manager of Tennessee-Missouri Bridge Commission, and in support of defendant's motions to dismiss upon his oath deposes and says as follows:

1—That the Tennessee-Missouri Bridge Commission is a body politic duly organized and existing for the uses and purposes authorized by the Acts of the Legislatures of Tennessee and Missouri and approved by an Act of Congress of the United States as set up and pleaded in said motions to dismiss.

2—That the names and addresses of the members of said Tennessee-Missouri Bridge Commission are as follows: Dr. E. L. Spence of Kennett, M. R. Rowland, S. P. Reynolds and Gordon Wright of Caruthersville, and Tom Ferg Hunter of New Madrid, all in the State of Missouri, and Jones Greer, Vernon Forcum and James Lanier of Dyersburg, and Miller J. Everett of Obion and Robert Sweatt of Ridgely, all in the State of Tennessee.

3—That the names and addresses of the officers of Tennessee-Missouri Bridge Commission are as follows: [fol. 10] E. L. Spence, Chairman, Miller J. Everett, Vice-

Chairman, Jones Greer, Treasurer, and J. F. Patterson of Caruthersville, Missouri, Secretary and General Manager.

4—That at a Meeting of the Commissioners of Tennessee-Missouri Bridge Commission held at the Majestic Hotel in Caruthersville, Missouri, on November 4, 1949, it was unanimously ordered that the Business Office and Headquarters of said Tennessee-Missouri Bridge Commission be located and set up and maintained at Caruthersville, Missouri, which was accordingly done, and said Business Office and Headquarters of said Commission has at all times since been located in Caruthersville, Missouri.

5—That after the organization of the Tennessee-Missouri Bridge Commission a contract was made and entered into by and between said Commission and the Secretary of the Treasury of the United States which defined the status of said Tennessee-Missouri Bridge Commission as a governmental agency and that the interest income on all of the bonds which might be issued by said Commission would be exempt from Federal Income Taxes.

6—That the states of Tennessee and Missouri and the United States allocated the sum of $100,000.00 to said Tennessee-Missouri Bridge Commission for the uses and purposes enjoined upon said Commission by the Acts of the Legislatures aforesaid and the Act of Congress, and approximately $48,000.00 of said allocation has been expended under the orders of said Commission.

7—That thereafter in pursuance to the powers and duties enjoined upon said Commission by the Legislative Acts aforesaid said Commission purchased and acquired title to what is known as the Tiptonville Ferry which operates a ferry across the Mississippi River between Tennessee and Missouri and being the instrumentality upon which Faye Petty, deceased, lost his life while employed by said Tennessee-Missouri Bridge Commission, and said Commission by resolution duly passed and [fol. 11] approved issued its revenue tax free bonds in

the amount of $200,000.00 bearing interest at the rate of 5% per annum for the purpose of paying the purchase price of said ferry, and the sum of $180,000.00 of said bonds are still outstanding and unpaid, and all of the ferry property and the income therefrom was pledged to secure the payment of said revenue bonds and the interest accruing thereon.

8—That said Tennessee-Missouri Bridge Commission has never at any time transacted any business except that which is authorized by the Legislative Acts aforesaid, and has not at any time engaged in any business within the jurisdiction of the St. Louis Division of the United States District Court, and said Commission has never at any time maintained any Business Office or Headquarters outside of the City of Caruthersville, Missouri.

Further affiant sayeth not.

(Signed) J. F. Patterson.

Subscribed and sworn to before me this 27th day of December, 1956. My term expires October 15, 1960.

(Signed) Betty Lou Craven,
Notary Public.

(Seal)

IN UNITED STATES DISTRICT COURT

EVIDENCE AT HEARING ON DEFENDANT'S (APPELLANT'S) MOTION TO DISMISS HELD AT CAPE GIRARDEAU, MISSOURI, MARCH 2, 1957

Roy W. Harper, District Judge, presiding.

APPEARANCES

Present for plaintiff (appellant) Douglas MacLeod, St. Louis, Missouri, W. M. Miles and Charles Miles of Union City, Tennessee, and Fred Robertson of Tiptonville, Tennessee.

Present for Defendant (Appellee), James M. Reeves of Ward and Reeves, Caruthersville, Missouri.

[fol. 12] NOTES RE EVIDENCE INTRODUCED BY DEFENDANT

Defendant introduced the statutes of Missouri and Tennessee setting up the defendant Commission; to-wit, Sections 234.360 to 234.420 of the Statutes of Missouri 1949 and House Bill #980, Chapter 167, Public Acts of 1949 of the Tennessee Legislature and House Bill #981, Chapter 168 of the Public Acts of 1949 of the Tennessee Legislature, also the Act of Congress approving the compact between Tennessee and Missouri which is Public Law 411, Chapter 758, Acts of the 81st Congress (House Resolution 6109).

The defendant (appellee) also presented testimony of J. F. Patterson, Secretary of the defendant Commission and documentary material tending to prove the matters of fact set out in its affidavit marked Exhibit "A", annexed to its Motion, included elsewhere in this Record, and incorporated herein by reference.

No evidence was presented by the plaintiff (appellant).

(No oral arguments were presented and the matter was submitted upon memoranda.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S 57 C 1

NAOMI PETTY, Administratrix of the Estate of Faye R. Petty, Deceased, Plaintiff,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation, Defendant.

Harper, Judge.

APPEARANCES:

For Plaintiff: Mr. Douglas MacLeod, 722 Chestnut Street, St. Louis 1, Missouri.

[fol. 13] For Defendant: Mr. James M. Reeves, of Ward & Reeves, Caruthersville, Missouri.

MEMORANDUM OPINION AND ORDER—July 12, 1957

This matter is before the court on defendant's motion to dismiss on the basis that the defendant is an immediate agency and arm of the sovereign states of Tennessee and Missouri and of the Federal government, and is immune from tort actions.

Similar motions to dismiss are often treated as a motion for summary judgment. Suckow Borax Mines Consolidated v. Borax Consolidated, 185 F. 2d 196.

The facts with respect to the motion are undisputed and so will not be discussed by the court in detail. This is an action by an administratrix to recover for the wrongful death of the deceased under the Jones Act, Sec. 688, 46 U. S. C. A.

The deceased was a member of the crew of a ferry vessel which was owned and operated by the defendant. The vessel's operation included transporting automobiles across the Mississippi River to and from Tennessee and Missouri. Defendant is organized and existing under the laws of Tennessee and Missouri and under the authority of Congress. The deceased was a deck hand on the ferry vessel. As the ferry vessel was en route across the river a collision occurred with another vessel and defendant was trapped in the pilot house and drowned when the ferry vessel sank.

The law is well settled that the sovereign cannot be sued in its own courts or any other court without its consent and permission. The question of whether a particular suit is one against the sovereign is not to be determined solely by reference to the nominal parties to the suit, but is dependent on the nature and effect of the suit. Here the suit is one about which the subject matter is an interest of value of a material sense to both states. A judgment against the defendant would operate to affect directly the two sovereigns, and so to determine the matter here we must turn to the question of whether or not consent and permission were given for parties in tort action to sue the defendant. The compact creating the defendant commission [fol. 14] in part reads as follows: "To contract, to sue and

be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property."

This clearly gives the defendant the power to sue and to be sued, but such does not waive immunity from liability for actions in tort. No consent has been given by the defendant for tort actions. Defendant was given no authority to pay judgments, and if a judgment were rendered against the defendant in this case the two states and the Federal government would be responsible. The operation of the defendant is governmental in nature.

To properly determine the effect of the provision, "to contract, to sue and to be sued in its own name", we must ascertain the intentions of the lawmakers, and in doing so we must refer to the doctrine of "ejusdem generis". The "ejusdem generis" rule is that, where statute contains general words only, such general words are to receive a general construction but where it enumerates particular classes of things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified. Hammett v. Kansas City, 173 S. W. 2d 70.

Following this rule, the words "to sue and to be sued" used in the compact apply only to contracts and did not have the effect of waiving immunity from tort actions.

The motion to dismiss will be sustained and cause dismissed.

(Signed) Roy W. Harper, U. S. District Judge.

July 12, 1957.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed August 9, 1957

Notice is hereby given that Naomi Petty, Administratrix of the Estate of Faye R. Petty, deceased, Plaintiff above named, hereby appeals to the United States Court of Ap-

peals for the Eighth Circuit from the Order dismissing the within action entered herein on July 12, 1957.

Fred Robertson, Miles and Miles,
(Signed) Douglas MacLeod, 722 Chestnut Street, St. Louis, Missouri, Attorneys for Plaintiff-Appellant.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOCKET ENTRIES

December 7, 1956—Complaint with demand for jury trial filed and summons issued.

[fol. 16]
December 13, 1956—Marshal's Return filed. Summons, etc., executed on Ten-Mo Bridge Commission (With Dr. E. L. Spence) 12/11/56.

December 28, 1956—Defendant's Motions to Dismiss for Improper Venue and to Dismiss Account Immunity filed.

January 2, 1957—Defendant's Motions to Dismiss for Improper Venue and to Dismiss Account Immunity and entire file delivered to Judge Harper.

January 8, 1957—Order filed sustaining Motion of Defendant to Transfer for Improper Venue from the Eastern to the Southeastern Division of the District and directing the clerk of this Court to transfer all files together with attached copy of this Order and the Docket Entries in this proceeding to the Clerk of the aforesaid Court at Cape Girardeau, Missouri. Notice of Order and Transfer of Cause mailed to attorneys of record herein.

SOUTHEASTERN DIVISION

January 10, 1957—Attested copy of order of Judge Roy W. Harper, transferring cause from the Eastern Division to the Southeastern Division of District Court together with docket entries, etc., filed. Jury trial demanded.

March 2, 1957—Defendant's Motion to Dismiss Account of Immunity for Tort Action heard; defendant granted ten days to submit brief; plaintiff ten days thereafter to submit answering brief; and defendant five days thereafter in which to submit reply brief; upon receipt of all briefs motion will be taken as submitted.

[fol. 17]

July 12, 1957—Memorandum Opinion and Order of Judge Roy W. Harper sustaining Motion to Dismiss and Dismissing Cause filed. Notice mailed by the Court to Douglas MacLeod, attorney for plaintiff, and James M. Reeves, attorney for defendant.

August 9, 1957—Plaintiff's Notice of Appeal to U. S. Court of Appeals, Eighth Circuit, from Order dismissing action entered July 12, 1957, filed and copy of Notice forwarded to Ward and Reeves, attorneys for defendant. Plaintiff's cost bond on Appeal, sum of $250 filed.

August 12, 1957—Plaintiff's cost bond in the sum of $250 approved.

September 9, 1957—Original Notice of Appeal and two certified copies of the Docket Entries delivered to the U. S. Court of Appeals, Eighth Circuit.

[fol. 18]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,878

Appeal from the United States District Court
for the Eastern District of Missouri

NAOMI PETTY, Administratrix of the Estate of FAYE R. PETTY, Deceased, Appellant,

v.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation, Appellee.

Douglas MacLeod (Fred Robertson and Miles & Miles were with him on the brief) for Appellant.

James M. Reeves (Ward & Reeves was with him on the brief) for Appellee.

Before Gardner, Chief Judge, and Johnsen and Van Oosterhout, Circuit Judges.

OPINION—May 1, 1958

VAN OOSTERHOUT, Circuit Judge.

Plaintiff-administratrix has appealed from final order dismissing her complaint for damages for wrongful death of her decedent. Plaintiff, as administratrix of the estate [fol. 19] of her deceased husband, in her complaint asserted that her deceased husband, while employed as a seaman upon a ferry boat operated by the defendant across the Mississippi River between Tiptonville, Tennessee, and Portageville, Missouri, met his death when trapped in the pilot house of the ferry boat as it sank, as the result of a collision with another boat; that her husband's death was caused by the negligence of the defendant; and that recovery of damages is authorized by the Jones Act, 46 U.S.C.A., § 688.

Defendant filed a motion to dismiss based upon the following grounds:

> "1—Because this action is essentially a suit against the States of Tennessee and Missouri, which cannot be maintained in the Courts of the United States, or any other Courts.
>
> "2—Because this action is in substance and effect one against the States of Tennessee and Missouri, without consent, over which neither the judicial power of the United States or the States of Tennessee or Missouri extends.
>
> "3—Because this is a suit against an agency created by the sovereign States of Tennessee and Missouri, approved by an Act of Congress, and suits of this class are not permitted by the Constitution and Laws of the States of Tennessee and Missouri, or either of them, and this defendant is immune and not liable in damages in suits of this class,
>
> "4—Because this Court has no jurisdiction over the person of this defendant, or the subject matter of this action."

The court in its decision states that the motion may be treated as a motion for summary judgment.

The trial court sustained the defendant's motion and dismissed the complaint upon the basis that the suit [fol. 20] against the defendant was in effect a suit against the States of Tennessee and Missouri, that the defense of sovereign immunity was available to said States, and that such defense had not been waived. The appeal challenges the validity of this determination.

Plaintiff in her brief states that defendant's claim of sovereign immunity must be denied for each of the following reasons: (1) defendant is a separate entity from the States of Tennessee and Missouri; (2) the States have waived sovereign immunity; (3) the States, by empowering the Commission to engage in maritime commerce and interstate commerce, "subordinated themselves and it to the Federal Government's power to regulate interstate

commerce and its power over matters maritime, and all laws enacted to implement these powers, including the Jones Act."

The pertinent facts relative to the creation and operation of the Bridge Commission may be summarized. The Bridge Commission is a "body corporate and politic." The Commission was created in 1949 pursuant to the General Bridge Act of 1946, 33 U.S.C.A., §§ 525-533, by joint action of the legislatures of Tennessee and Missouri (Chapters 167 and 168 of the Public Acts of 1949 of the Tennessee Legislature, and Revised Statutes of Missouri, Sections 234.360-234.420) and by special act of Congress (Public Law 411, 81st Congress, Chapter 758). Congressional approval was required by Article I, Section 10, Clause 3 of the Constitution of the United States, which provides, "No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State * * *." The terms of the interstate compact are set out in full in each of the state acts and in the congressional act of approval. The main function of the [fol. 21] Commission is to plan, construct, maintain, and operate an interstate bridge near Caruthersville, Missouri, with authority granted to purchase and operate ferries across the river within 25 miles of the bridge site.

We now consider the question of whether the Commission is an entity separate and apart from the States of Tennessee and Missouri.

In *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, the action was brought against various state officials who constituted the Department of Treasury. The action was dismissed on the basis of sovereign immunity. The Court, in support of its determination that the suit was one against the state, says (p. 464):

> "* * * We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. * * * And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. * * *"

In *Kansas City Bridge Co.* v. *Alabama State Bridge Corp.*, 5 Cir., 59 F.2d 48, the action against the bridge company was held to be one against the state, the court stating (pp. 49-50):

> "It is clear that the whole purpose of the act was to erect bridges essential to the highway system, to pay for them with tolls, and then to make them free for the use of the public. It is well settled that the construction of public roads and bridges is a governmental function. * * * The state may either perform this function in its own name or through its public officers or one of its governmental agencies. * * * The Alabama Bridge Corporation was but an agency or instru- [fol. 22] mentality through which the state acted in causing its public bridges to be constructed. It was not a private corporation in any sense of the word, but state officials, who might as well have been designated a board or commission, were ex officio members, and the only members, of it. * * * In the nature of things the state had to choose some such agency in order to effectuate its purpose. * * * "

In *Cargile* v. *New York Trust Co.*, 8 Cir., 67 F2d. 585, the plaintiff brought an action against the members of the Highway Commission of the State of Arkansas, seeking to have a receiver appointed to take charge of a toll bridge. The action was held to be in effect an action against the State of Arkansas and was dismissed for want of jurisdiction. *Copper S. S. Co.* v. *State of Michigan*, 6 Cir., 194 F.2d 465, involved a suit for damages caused by a ferry boat operated across the Mackinac Straits by the State Highway Department. The action was held to be one against the state and was dismissed.

In our present case, it is apparent that the purpose of the States in entering into the compact and in carrying out the authorized activity was to perform their respective governmental obligations to furnish the public with necessary highways and bridges. The defendant Commission was the agency or instrument of the two States and not an entity separate and apart from the States. The Commis-

sion could issue no stock. It was controlled by state officials appointed by the respective governors with senate confirmation. Commission action could be authorized only upon a majority vote of the commissioners from each State. Veto power was reserved to the governors. The Commission's authorized bonds were granted exemption from income taxation. Its revenue from tolls could only be used for reasonable operating expenses and for pay-
[fol. 23] ment of its bonds and interest, and when the indebtedness was paid the bridge was to belong to the two States and to be operated free of tolls. The Commission afforded no opportunity for realization of private profits to anyone. It had no right to levy taxes. Its tolls were pledged exclusively for operating expenses and bond payments. Aside from the tolls, its only sources of money were the creating States and the Federal Government. It is apparent that a judgment against the Commission and a seizure of the ferry would adversely affect the participating States in the performance of their duty of providing a means of crossing the river.

Plaintiff urges that inasmuch as defendant is a creature of two States, it must be a separate entity. We see no insuperable obstacle to several states using the same instrumentality to carry out a common governmental obligation. As heretofore pointed out, the Constitution of the United States specifically provides for congressional approval of compacts between states. The approval of the compact by Congress at least lends support to the propriety of the States carrying out the project here involved jointly.

Justice Frankfurter and Dean Landis, in an article in 34 Yale Law Journal 685, discuss the compact clause of the Constitution, and in an appendix set out many instances in which compacts have been utilized. The effectiveness of the compact in solving many interstate problems is pointed out. The Port of New York Authority is an example of an interstate compact. This authority was created by New York and New Jersey with the approval of Congress. It performs harbor duties and provides bridges and tunnels connecting the two States. In *Howell v. Port of New York Authority*, D.C. N.J., 34 F.Supp. 797,

[fol. 24] the compact creating the Authority was discussed. In dismissing the action, the court states (p. 801):

> "The Port Authority, a bi-state corporation * * * is a joint or common agency of the states of New York and New Jersey. It performs governmental functions which project beyond state lines, and it is immune from suit without its consent. * *." *

To the same effect see *Rao* v. *Port of New York Authority*, E.D. N.Y., 122 F.Supp. 595, affd. 2d Cir., 222 F.2d 362.

We are satisfied that the defendant Commission is an instrumentality of both Tennessee and Missouri and that it is not an entity separate and distinct from the States.

Plaintiff next contends that the States have waived any immunity they might have because of the provision contained in the compact reading as follows:

> "[The Commission] shall have the following powers and duties:
>
> "3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property * * *."

Some support for plaintiff's contention that there is a tendency to give statutes authorizing suits a liberal construction is found in cases involving corporations created by the Federal Government and in Tort Claims Act suits. However, no such tendency is apparent in cases involving the waiver of sovereign immunity on the part of states. *Porto Rico* v. *Rosaly*, 227 U.S. 270; *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47; *Ford Motor Co.* v. *Department of Treasury of Indiana*, supra; *Copper S. S. Co.* v. *State of Michigan*, supra; *Pacific Fruit & Produce Co.* v. *Oregon Liquor Control Commission*, D. C. Ore., 41 F.Supp. 175.

[fol. 25] In *Porto Rico* v. *Rosaly*, supra, the issue was whether the sovereign immunity defense was available to Porto Rico. It was contended that the power granted Porto Rico to sue and be sued deprived it of such immunity. The

Court conceded that such words standing alone could be so construed, but stated that when they are considered in context they could not be interpreted in such a way as to deprive Porto Rico of such a vital right as sovereign immunity. In the *Read* case, supra, the state had authorized suit to recover taxes illegally collected. The statute was construed to limit the waiver to suits in the state court. The Court states (pp. 53-54):

> "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures. * * * "

The Supreme Court has stated that administrative constructions by a state of its statutes of consent influence its conclusions. *Great Northern Life Ins. Co.* v. *Read*, supra; *Ford Motor Co.* v. *Department of Treasury of Indiana*, supra.

The Supreme Court of Missouri in *Todd* v. *Curators of University of Missouri*, —— Mo. ——, 147 S.W.2d 1063, 1064, states:

> "A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. * * * But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity [fol. 26] from liability for the torts of the officers or agents of the state is quite another thing.' *Bush* v. *Highway Commission*, 329 Mo. 843, loc. cit. 849, 46 S.W.2d 854, loc. cit. 856. * * * "

In Tennessee, statutes permitting suits against the State are strictly construed. *State* v. *Cook*, —— Tenn. ——, 106 S.W.2d 858; *Hill* v. *Beeler*, —— Tenn. ——, 286 S.W.2d 868.

An application of the law above stated to the undisputed facts before us leads us to the conclusion that the language used in the compact, when considered in context, can not be construed to constitute a waiver of sovereign immunity as to tort liability by the States of Tennessee and Missouri. The words "to sue and be sued" immediately follow the words "to contract." There is no express waiver of tort liability, nor can such a waiver be fairly implied. It is reasonable to assume that the drafters of the compact had in mind the interpretation of their courts to the effect that the grant of a right to sue and be sued did not include a waiver of immunity as to tort liability.

We have determined that the suit was in effect a suit against the States of Tennessee and Missouri, and that neither of said States has waived its sovereign immunity as to tort liability. Under such circumstances, the trial court and this court are without jurisdiction to entertain this action.

Defendant's motion asserts that the action is in effect an action against the States, and that the court has no jurisdiction over the defendant or the subject matter of the action. While the bar of the Eleventh Amendment to the Constitution of the United States is not specifically asserted, we are inclined to think that the court's jurisdiction was sufficiently challenged. In any event, we believe [fol. 27] that we are obligated to determine whether the Eleventh Amendment deprives this court of jurisdiction.

In *Ford Motor Co.* v. *Department of Treasury of Indiana*, supra, the Supreme Court states (p. 467):

> "• • • The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

commenced or prosecuted against one of the United States by Citizens of another State of by Citizens or Subjects of any Foreign State."

It has uniformly been held that federal judicial power does not extend to any suit in law or equity against a state by citizens of another state even in cases arising under the Constitution or laws of the United States. *Missouri* v. *Fiske*, 290 U.S. 18; *Great Northern Life Ins. Co.* v. *Read*, supra; *Cargile* v. *New York Trust Co.*, supra. In the case last cited this court applies the rule above stated and cites many cases supporting it.

The complaint shows the plaintiff to be a resident of Tennessee. The authorities just cited would bar a tort action against Missouri. The Amendment does not by its terms bar a citizen from suing his own state. However, the Supreme Court has squarely held that a state can not be sued without its consent in a federal court by one of its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1. In *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 304, footnote 13, the decision in *Hans* v. *Louisiana* is recognized as properly stating the law.

[fol. 28] Plaintiff contends that jurisdiction exists because of Article 3, Section 2 of the Constitution of the United States providing that judicial power shall extend to all cases in admiralty and maritime jurisdiction. This is the same section of the Constitution which confers jurisdiction over cases arising under the Constitution and laws of the United States. The Court, in the cases heretofore cited, has held that the provision granting jurisdiction over cases arising under the laws of the United States does not give a federal court jurisdiction in a suit by a citizen against a state, and no reason is apparent why the portion of the same section of the Constitution granting admiralty jurisdiction should receive any different treatment.

In *Ex Parte State of New York, No. 1*, 256 U.S. 490, the Court held that a state could not be sued in admiralty for maritime tort without its consent. The Court fully discusses the reasons for upholding state immunity, and distinguishes *Workman* v. *New York City*, 179 U.S. 552,

relied upon by the plaintiff. Among other things, the Court states (pp. 498, 502-503):

> " • • • In *Hans* v. *Louisiana, supra* (p. 15), the court demonstrated the impropriety of construing the Amendment so as to leave it open for citizens to sue their own State in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not."
>
> "There is no substance in the contention that this result enables the State of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in *Workman* v. *New York City,* 179 U.S. 552, 557-560; • • • [fol. 29] The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. • • • It is not inconsistent in principle to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction."

In *Ex Parte State of New York, No. 2,* 256 U.S. 503, it was held that a ship owned by New York and used for governmental purposes could not be seized by admiralty process in rem in an action for damages caused by the negligent operation of the ship.

Plaintiff contends that the States are subject to federal laws regulating interstate commerce and maritime matters, and that the Jones Act was enacted pursuant to such powers.

We find nothing in the Jones Act which shows any congressional intention to make its provisions applicable when either the State or Federal Government is the employer. In the comment found in Cumulative Supplement

46 U.S.C.A. 57, 61, it is stated that the Jones Act applies only to vessels of private ownership or operation. The Federal Government has power to regulate interstate commerce and maritime activities. However, such power is not broad enough to authorize any federal legislation which would impair the constitutional immunity granted states from suits by citizens against such states in federal courts. If the Jones Act were construed to impose tort liability upon states for injuries to its seaman employees, there is grave danger that such a provision would con- [fol. 30] flict with the Eleventh Amendment. Ambiguous statutes are generally construed in such a way as to preserve their constitutionality.

United States v. *California*, 297 U.S. 175, relied upon by the plaintiff, is not in conflict with the result we reach. The action in that case was brought by the United States and not by an individual, and hence no conflict with the Eleventh Amendment arises in that case.

We conclude that the trial court, by reason of the provisions of the Constitution, and particularly the Eleventh Amendment, had no jurisdiction of this suit, brought in effect against the States of Tennessee and Missouri. The trial court properly dismissed the action for want of jurisdiction.

Affirmed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15878—September Term, 1957.

NAOMI PETTY, Administratrix of the Estate of FAYE R. PETTY, Deceased, Appellant,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a corporation.

JUDGMENT—May 1, 1958

Appeal from the United States District Court
for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

[fol. 32] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 33]

SUPREME COURT OF THE UNITED STATES

No. 233, October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 233

NAOMI PETTY, Administratrix of the Estate of FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHARLES W. MILES, III,
W. MORRIS MILES,
Union City, Tennessee,
FRED ROBERTSON,
Tiptonville, Tennessee,
DOUGLAS MACLEOD,
722 Chestnut Street,
St. Louis, Missouri,
Attorneys for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. .....

NAOMI PETTY, Administratrix of the Estate of FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Naomi Petty, executrix of the estate of Faye R. Petty, deceased, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on May 1, 1958.

A. OPINIONS BELOW.

1. The opinion of the District Court will be found in the record printed for use by the Court below (R. 12-14), nine copies of which are filed herewith.

2. The opinion of the Court of Appeals which is reported in _____ F. 2d _____ is appended hereto (Appendix A).

B. JURISDICTION.

The judgment of the Court of Appeals was entered on May 1, 1958 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

C. QUESTIONS PRESENTED.

1. Whether the judicial power of the United States extends to an action at law under the Merchant Marine Act of 1920, Sec. 33, 46 U. S. Code 688 (Jones Act), by the executor of a deceased seaman (river boatman) against his employer, the Tennessee-Missouri Bridge Commission, a "body corporate and politic" created by interstate compact between the States of Tennessee and Missouri, and sanctioned by Congress—pursuant to Article I, Section 10, cl. 3 of the U. S. Constitution, or whether Federal jurisdiction is absent by virtue of the 11th Amendment to the U. S. Constitution.

2. Whether in this action the Tennessee-Missouri Bridge Commission, empowered by the compact to "sue and be sued", is clothed with the sovereign immunity of the states of Tennessee and Missouri as respects maritime tort actions.

D. STATUTES INVOLVED.

The statutes involved are U. S. Constitution, Article I, Section 8; U. S. Constitution, Article I, Section 10, cl. 3; U. S. Constitution, Article III, Section 2; U. S. Constitution, Amendment XI; Federal Employers Liability Act, 45 U. S. Code 51 *et seq.*; Merchant Marine Act of 1920, Section 33 (Jones Act), Title 46, U. S. Code, Section 688; Public Law 411 of the 81st Congress, Chapter 758, H. R. 6109; 28 U. S. Code 1254 (1); 28 U. S. Code 1331; 28 U. S. Code 1333 (1); Chapters 167 and 168, Public Acts of 1949 of the Tennessee Legislature and Revised Statutes of Missouri, 1949, Sections 234.360 to 234.420 (Same as Tennessee), which are all set out in Appendix C, pp. A15 to A24.

E. STATEMENT OF THE MATTER INVOLVED.

With a few amendments the facts stated in the opinion of the Court of Appeals (Appendix A, *infra*, p. A1) are accepted for the purposes of this petition. The amendments are inserted parenthetically:

Plaintiff-administratrix has appealed from final order dismissing her complaint for damages for wrongful death of her decedent. Plaintiff, as administratrix of the estate of her deceased husband, in her complaint asserted that her deceased husband, while employed as a seaman upon a ferry boat operated by the defendant (as a common carrier charging fares) across the Mississippi River between Tiptonville, Tennessee, and Portageville, Missouri, met his death when trapped in the pilot house of the ferry boat as it sank, as the result of a collision with another boat; that her husband's death was caused by the negligence of the defendant; and that recovery of damages is authorized by the Jones Act, 46 U. S. C. A., § 688.

Defendant filed a motion to dismiss based upon the following grounds:

"1. Because this action is essentially a suit against the States of Tennessee and Missouri, which cannot be maintained in the Courts of the United States, or any other Courts.

"2. Because this action is in substance and effect one against the States of Tennessee and Missouri, without consent, over which neither the judicial power of the United States or the States of Tennessee or Missouri extends.

"3. Because this is a suit against an agency created by the sovereign States of Tennessee and Missouri, approved by an Act of Congress, and suits of this class are not permitted by the Constitution and Laws of the States of Tennessee and Missouri, or either of them, and this defendant is immune and not liable in damages in suits of this class.

"4. Because this Court has no jurisdiction over the person of this defendant, or the subject matter of this action."

The court in its decision states that the motion may be treated as a motion for summary judgment.

The trial court sustained the defendant's motion and dismissed the complaint upon the basis that the suit against the defendant was in effect a suit against the States of Tennessee and Missouri, that the defense of sovereign immunity was available to said States, and that such defense had not been waived * * *.

The pertinent facts relative to the creation and operation of the Bridge Commission may be summarized. The Bridge Commission is a "body corporate and politic." The Commission was created in 1949 pursuant to the General Bridge Act of 1946, 33 U. S. C. A., § 525-533, by joint

action of the legislatures of Tennessee and Missouri (Chapters 167 and 168 of the Public Acts of 1949 of the Tennessee Legislature, and Revised Statutes of Missouri, Sections 234.360-234.420) and by special act of Congress (Public Law 411, 81st Congress, Chapter 758). Congressional approval was required by Article I, Section 10, Clause 3 of the Constitution of the United States, which provides, "No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State * * *." The terms of the interstate compact are set out in full in each of the state acts and in the congressional act of approval. (This special act of Congress approving the pact, Public Law 411, 81st Congress, Chapter 758, H. R. 6109, provides as follows:

> BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:
>
> The consent of Congress is hereby given to the compact or agreement set forth below, and to each and every term and provision thereof; PROVIDED, That any obligations issued and outstanding, including the income derived therefrom, under the terms of a compact or agreement, and any amendments thereto, shall be subject to the tax laws of the United States;*
>
> AND PROVIDED FURTHER, That nothing herein contained shall be construed to affect, impair, or diminish any right, power or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters, or any commerce between the States or with foreign countries, or any bridge, rail-

*By subsequent administrative action of the Treasury department immunity from Federal income taxes on the interest income from bonds was granted, notwithstanding this Congressional proviso (R. 10).

road, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof: AND PROVIDED FURTHER, That after the costs of the bridge have been amortized, such bridge shall thereafter be maintained and operated free of tolls.

Then follows the compact between the two states set out in full. See Appendix C, *infra*).

The main function of the Commission is to plan, construct, maintain, and operate an interstate bridge near Caruthersville, Missouri, with authority granted to purchase and operate ferries across the river within 25 miles of the bridge site. (Among the powers conferred upon the Commission are the powers "to contract, to sue and be sued in its own name.")

The jurisdiction of the District Court rests upon Article III, Section 2 of the U. S. Constitution and the enabling portion of the Judicial Code, 28 U. S. Code 1333, 28 U. S. Code 1331, and 46 U. S. Code 688.

The Court of Appeals affirmed the judgment of the District Court on May 1, 1958, and issued its opinion which is appended hereto (Appendix A) and judgment (Appendix B).

F. REASONS FOR ALLOWANCE OF WRIT.

1. The United States Court of Appeals for the Eighth Circuit has decided two important questions of federal law which have not been, but should be settled by this Court, namely:

a. Whether bi-state or multi-state agencies or instrumentalities having a corporate existence, established

by compact under Article I, Section 10, Clause 3 of the Constitution of the United States and which operate vessels on navigable waters of the United States are clothed with the sovereign immunity from suit which the individual states themselves enjoy as respects purely internal affairs.

b. Whether such a joint instrumentality which is engaged in maritime commerce as a common carrier, is subject to Jones Act actions by its seamen employees in United States District Courts.

2. The Court of Appeals for the Eighth Circuit has decided two questions of federal law conflicting in principle with two applicable decisions of this Court, namely;

a. In *Workman* v. *Mayor of New York*, (1900) 179 U. S. 552, 45 L. Ed. 314, 21 S. Ct. 212, this Court held that a public corporate body (the City of New York) which had "general capacity to stand in judgment", being "subject to suit and amenable to process" was liable for the commission of maritime torts, notwithstanding a local rule of law extending sovereign immunity from tort actions to municipal corporations for torts committed while performing a governmental function. In the instant case, the Court of Appeals for the Eighth Circuit decided that the respondent commission, a "body corporate and politic", was, notwithstanding the power conferred upon it "to sue and be sued in its own name", clothed with sovereign immunity from an action based upon a maritime tort.

b. In *United States* v. *California*, (1936) 297 U. S. 175, 80 L. Ed. 567, 56 S. Ct. 421, this Court held that the State of California, in operating a railroad in interstate commerce, was subject to the Safety Appliance Acts (45) U. S. Code 1, *et seq.*, in the same manner as though the railroad were privately owned and operated, whereas the Court of Appeals of the Eighth Circuit in the instant

case holds that the Jones Act, which is the maritime equivalent of the Federal Employers Liability Act (companion legislation to the Safety Appliance Acts); has no application to a bi-state instrumentality, a "body corporate and politic", although operating in interstate commerce and on navigable waters of the United States.

ARGUMENT.

I.

Is This a Suit Against the States Themselves?

Much confusion has been engendered by an apparent conflict between *Workman* and *In re State of New York et al.*, (1920) 256 U. S. 490, 41 S. Ct. 588. The two cases are distinguishable on their facts, since *Workman* involved a municipal corporation and *State of New York* involved the state. Subsequent decisions of lower courts, however, including the instant decision by the Court of Appeals of the Eighth Circuit, have found the two decisions in conflict and this conflict, whether real or merely apparent, should be resolved by this Court once and for all, in order to provide a guide for the future. *State of New York* is heavily relied upon by the Court of Appeals for its decision in the instant case.

If *Workman v. Mayor of New York, supra*, is the law, the instant case would seem to be capable of resolution within its framework, since the action was brought, not against the States of Missouri and Tennessee or either of them, but against the Commission, "a body corporate and politic", which by the terms of the compact creating it has power to sue and be sued, in contract, at the very least, according even to the local law of Tennessee and Missouri, if the construction of their courts be placed upon the

language in question. Being in court, and "having capacity to stand in judgment", in the same manner as the City of New York in *Workman* the Commission should not be permitted to assert the local rules of Tennessee and Missouri which grant immunity to municipal corporations and special purpose bodies for torts committed while engaged in a governmental function.

Indeed, the instant case is much stronger than *Workman*. The vessel there was a fire-boat and the "governmental" character of its operation was clear. Here we have a ferry which serves the members of the public at large and charges fares, a commercial operation producing revenue, and this is true despite the fact that in the long run, overall sense, the Commission was established as a self-liquidating, non-profit venture.

The leading text on maritime law regards *Workman* as valid. Benedict on Admiralty (6th Ed.), Volume I, pp. 481-482.

In resolving the question of whether the instant proceeding is a suit against the State, it is not, however, necessary to rely upon the *Workman* case. The question of whether a suit to which the State is not a party to the record is, in essence, a suit against the State, has frequently been passed upon by this Court, but never in the form in which it is here presented. Previous decisions of this Court have dealt in the main with suits against state boards or departments and/or individual state officers or purported officers. *Ford Motor Company v. Department of Treasury of the State of Indiana et al.*, 323 U. S. 459, 464-6, 65 S. Ct. 347, is a recent decision of this Court reviewing earlier decisions. *Ford* involved litigation against a state department and individual state officers. This Court held that since the State of Indiana was called upon

to respond financially to the judgment sought, the suit was in essence against the State. On page 464 of the opinion, this Court speaking through Justice Reed said:

> "* * * We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex parte Ayers*, 123 U. S. 433, 490, 499, 8 S. Ct. 164, 174, 175, 31 L. Ed. 216; *Ex parte State of New York*, 256 U. S. 490, 500, 41 S. Ct. 588, 590, 65 L. Ed. 1057; *Worcester County Trust Company* v. *Riley*, 302 U. S. 292, 296, 298, 58 S. Ct. 185, 186, 187, 82 L. Ed. 268. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Smith* v. *Reeves*, *supra*; *Great Northern Life Insurance Company* v. *Read*, *supra*. We are of the opinion, therefore, that the present proceeding was brought in reliance on Section 64-2614 (a) and is a suit against the state."

State of New York, *supra*, relied upon so heavily by the Court below, another case which dealt with a suit against state officers, also recognized the significance of the liability of the state to make satisfaction of any judgment recovered.

In the instant case the opinion of the district judge (R. 13-14) states that a judgment against the Commission "would operate to affect directly the two sovereigns * * * and if a judgment were rendered against the defendant in this case, the two states and the Federal Government would be responsible. The operation of the defendant is governmental in nature". The Court of Appeals' opinion does not go this far and indeed there is nothing elsewhere in the record to warrant such a conclusion. The latter opinion (Appendix A 1, p. A1) (opinion page 6) states:

"It is apparent that a judgment against the Commission would adversely affect the participating states in the performance of their duty of providing a means of crossing the river", which of course is something quite different from a direct pecuniary liability on the part of the states and the Federal Government to satisfy a judgment.

Here the record is barren as respects any pecuniary responsibility of the states to satisfy a judgment, other than the gratuitous remarks of the district judge. The compact nowhere provides for payment by the states of judgments against the Commission. The states, although certainly "interested" in this litigation, to date have not seen fit to enter it, even by way of providing funds or defense counsel from their respective Attorney General departments. Neither state has participated even to the extent of becoming an *amicus curiae*.

Pecuniary responsibility for the judgment is indeed an essential element of a finding that a state is a real party in interest in litigation and it is submitted that in the instant case, this element is entirely lacking.

The record provides no basis for concluding that the instant proceeding is in essence a suit against the States of Missouri and Tennessee or either of them.

II.

Waiver of Sovereign Immunity and Subordination to Federal Power.

Even though in a particular case the court determines that the suit is, in effect, one against a state, it still remains to be determined whether the state has waived its sovereign immunity and the protection afforded that immunity by the Eighteenth Amendment of the Constitution. *Ford Motor*

Company v. *Department of Treasury of the State of Indiana et al.*, 325 U. S. 459, 464-465, 65 S. Ct. 347.

When a state engages in interstate commerce it subordinates itself to the commerce power of the United States set out in the Constitution, Article I, Section 8, and statutes enacted thereunder, including the Safety Appliance Acts, 45 U. S. Code 1 *et seq.*, *U. S. v. California*, (1936) 297 U. S. 175, 80 L. Ed. 567, ___ S. Ct. 421.

U. S. v. California was a proceeding by the Federal government to enforce the penalty provisions of the Safety Appliance Acts against the State of California, which owned and operated a terminal railroad which serviced dock areas in San Francisco Harbor. Upon a finding that this railroad was engaged in interstate commerce this court held that by engaging in such activity California had subordinated itself to the commerce power and statutes enacted thereunder, including the Safety Appliance Acts.

This Court stated (page 185 of 297 U. S. Reports):

> "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, *Swinson* v. *Chicago, St. Paul M. & O. Ry. Co.*, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041, 96 A. L. R. 1136, *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 594, 54 S. Ct. 826, 78 L. Ed. 1446, *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17, 25 S. Ct. 158, 49 L. Ed. 363, and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual

use is wholly intrastate. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 32 S. Ct. 2, 56 L. Ed. 72; *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, 214, 54 S. Ct. 402, 78 L. Ed. 755. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection."

It will be noted that as in the instant case, the railroad charged for its services, but in the overall sense was a nonprofit enterprise, using the revenues for harbor improvement. This court (l. c. 183-4), as in the Workman case, rejected the distinction sought to be made between "governmental" and proprietary capacities. This distinction figures largely in the opinion of the Court of Appeals (Appendix A, p. A1).

In a subsequent action at law in the California state court by an injured employee of the same railroad under the Federal Employer's Liability Act, 45 U. S. Code 51 *et seq.*, the appellate court held, specifically following *U. S.* v. *California*, that California had surrendered its sovereign immunity from suit by a private citizen under the Federal Employer's Liability Act, having subordinated itself to that law as well as the Safety Appliance Acts. *Maurice* v. *State*, (1941) 43 Cal. 270, 110 P. 2d 706.

The same rule has obtained with respect to the Railway Labor Act, 45 U. S. Code 151, *et seq.*, *New Orleans Public Belt Railroad Commission* v. *Ward*, C. A. 5 (1952), 195 F. 2d 829, *Taylor* v. *Fee*, C. A. 9 (1956), 233 F. 2d 251,

256. The latter case cites with approval *Maurice* v. *State*, *supra*.

The Jones Act, which is involved in the instant case, derives from both the commerce power and the power over matters maritime, Article III, Section 2, Constitution of the United States. *O'Donnell* v. *Great Lakes Dredge and Dock Company*, 318 U. S. 36, 39, 87 L. Ed. 596, 63 S. Ct. 488. It is remedial legislation, designed to protect employees from, and compensate them in the event of, injuries, and is construed liberally in favor of injured seamen. *Garrett* v. *Moore McCormack*, 317 U. S. 239, 63 S. Ct. 246; *O'Donnell* v. *Great Lakes Dredge & Dock Company*, *supra*; *Socony-Vacuum Company* v. *Smith*, 305 U. S. 424, 59 S. Ct. 252; *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748.

In determining whether or not the States of Missouri and Tennessee have waived sovereign immunity from maritime tort actions against the Commission, it is at the outset necessary to construe the language of the compact. The Commission is given the powers, among others "to contract, to sue and be sued in its own name." This language, frequently employed in setting up public bodies, has received a variety of constructions in the courts. The Courts of both Missouri and Tennessee, in respect to purely internal matters have adopted the narrow view, construing such language as permitting suit in contract but not in tort.

It must be borne in mind, however, that here we are dealing not with a state in respect to its own internal affairs but with two states which have entered into a compact which, under Article I, Section 10, clause 3 of the Constitution of the United States, was required to be sanctioned by the Congress of the United States. We are thus

dealing with not merely the construction that the courts of one state place upon given statutory language, but the courts of both states. As it happens here the courts of the two states agree, but what if they did not? What if one state to the compact followed the broad rule of construction and permitted suit in tort as well?

A compact between two or more states, created under Article I, Section 10, clause 3 of the United States Constitution requiring the sanction of Congress is a "federal title right, privilege or immunity", sufficient to confer jurisdiction upon the Courts of the United States under Section 1331 of the Judicial Code (28 U. S. Code 1331).

Delaware River Joint Toll Bridge Commission v. *Colburn*, 310 U. S. 419, 427, 60 S. Ct. 1039, 84 L. Ed. 1287.

This Court, in an early decision involving the construction of an interstate compact laid down the rule that no reference should be made to the decisions of the courts of the states (which are parties) respecting their own local rules of construction, since the construction of the compact is a matter of international law, in which local rules have no application. *Marlatt's Lessee* v. *Silk et al.*, 36 U. S. 1, 20, 11 Peters 20, 9 L. Ed. 609, 617.

Where the right of a seaman to sue his employer is at issue The Federal Courts apply a liberal rule of construction favoring the seaman. *Canadian Aviator, Ltd.*, v. *U. S.*, 324 U. S. 215, 65 S. Ct. 639, 89 L. Ed. 901; *American Stevedores* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011.

The language of the compact in the light of the foregoing should be construed to mean what it says and the tortured construction which permits suit in contract but not in tort should not be applied.

There is in the instant case, however, another and overriding consideration in determining whether or not the States of Missouri and Tennessee have waived for themselves and the Commission any sovereign immunity respecting maritime torts committed by the Commission. In order for the compact to be valid, Congress had to assent, and the intent of Congress is therefore also involved in the Construction of the language.

In this connection the intent of Congress has been made abundantly clear in the consent statute, Public Law 411, 81st Congress, Chapter 758, which provides specifically: "that nothing contained herein shall be construed to affect, impair or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof." It is clear that Congress was insisting that Tennessee, Missouri and the Commission subordinate themselves to existing (and future) laws enacted under the commerce and maritime powers, including the Jones Act and its liberal interpretation by the courts of the United States as remedial legislation, *Garrett* v. *Moore McCormack, supra; O'Donnell v. Great Lakes Dredge & Dock Company, supra; Socony-Vacuum Company* v. *Smith, supra: Panama Railroad Company* v. *Johnson, supra,* especially in view of the projected ferry operations of the Commission.

It is also reasonable to conclude that Congress, in giving its consent to the compact, by its reference to the courts of the United States, imposed the condition that

controversies involving the Commission should be subject to the jurisdiction of Federal Courts insofar as such courts possess jurisdiction over the subject matter generally. The instant case, which involves navigable waters and interstate commerce is certainly the type of situation Congress must have had in mind.

The record is clear that the States of Tennessee and Missouri, which were required to submit the compact for Congressional approval, accepted the conditions of this approval, and though later the Commission was able to obtain administrative relief from the tax proviso of the consent statute, it did not obtain, and could not have obtained relief from the other conditions imposed by Congress.

In *United States* v. *California* there was no question of a submission or subordination to Federal powers by virtue of language in an act of Congress. This Court found the subordination in the mere act of operating a railroad in interstate commerce. In the instant case, not only has the Commission engaged in interstate commerce in operating as a common carrier between the States of Tennessee and Missouri over the navigable waters of the Mississippi River, but in addition thereto, the states in question have clearly submitted to the power of the Federal Government and its courts in dealing with interstate commerce and matters maritime, and subordinated themselves by virtue of the terms upon which they obtained the consent of Congress for their compact. There is thus a double subordination and a double waiver of any sovereign immunity from suit in the instant case.

The court below distinguished *United States* v. *California* on the basis that since it was not a suit by an individual citizen of another state, the 11th Amendment did not apply. The principal point of the *California* case,

however, is its holding that a state by engaging in interstate commerce subordinates itself to the commerce power of the United States and places itself in the same position as a private citizen so engaged. The record in the instant case clearly demonstrates a waiver within the principle enunciated in the *California* case and the decision of the Court of Appeals is therefore in conflict with that case. It is clear from the *Ford* case, *supra*, and the authorities therein cited that the inhibition of the 11th Amendment may be waived by the state (or states) in question. Here this waiver is obvious in the full sense of the *California* case and in addition there is the acceptance by the states and the Commission of the conditions imposed by Congress in the consent statute. The conflict between the decision of the court below and *United States* v. *California* is clear despite the fact that an additional waiver or submission to Federal authority has taken place.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX "A".

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15,878

Naomi Petty, Administratrix of the Estate of Faye R. Petty, Deceased,

Appellant,

v.

Tennessee-Missouri Bridge Commission, a Corporation,

Appellee.

} Appeal from the United States District Court for the Eastern District of Missouri.

[May 1, 1958.]

Douglas MacLeod (Fred Robertson and Miles & Miles were with him on the brief) for Appellant.

James M. Reeves (Ward & Reeves was with him on the brief) for Appellee.

Before GARDNER, Chief Judge, and JOHNSEN and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff-administratrix has appealed from final order dismissing her complaint for damages for wrongful death of her decedent. Plaintiff, as administratrix of the estate of her deceased husband, in her complaint asserted that her deceased husband, while employed as a seaman upon a ferry boat operated by the defendant across the Mississippi River between Tiptonville, Tennessee, and Portageville, Missouri, met his death when trapped in the pilot house of the ferry boat as it sank, as the result of a collision with another boat; that her husband's death was caused by the negligence of the defendant; and that recovery of damages is authorized by the Jones Act, 46 U.S.C.A., § 688.

Defendant filed a motion to dismiss based upon the following grounds:

> "1—Because this action is essentially a suit against the States of Tennessee and Missouri, which cannot be maintained in the Courts of the United States, or any other Courts.
>
> "2—Because this action is in substance and effect one against the States of Tennessee and Missouri, without consent, over which neither the judicial power of the United States or the States of Tennessee or Missouri extends.
>
> "3—Because this is a suit against an agency created by the sovereign States of Tennessee and Missouri, approved by an Act of Congress, and suits of this class are not permitted by the Constitution and Laws of the States of Tennessee and Missouri, or either of them, and this defendant is immune and not liable in damages in suits of this class.
>
> "4—Because this Court has no jurisdiction over the person of this defendant, or the subject matter of this action."

The court in its decision states that the motion may be treated as a motion for summary judgment.

The trial court sustained the defendant's motion and dismissed the complaint upon the basis that the suit against the defendant was in effect a suit against the States of Tennessee and Missouri, that the defense of sovereign immunity was available to said States, and that such defense had not been waived. The appeal challenges the validity of this determination.

Plaintiff in her brief states that defendant's claim of sovereign immunity must be denied for each of the following reasons: (1) defendant is a separate entity from the States of Tennessee and Missouri; (2) the States have waived sovereign immunity; (3) the States, by empowering the Commission to engage in maritime commerce and interstate commerce, "subordinated themselves and it to the Federal Government's power to regulate interstate commerce and its power over matters maritime, and all laws enacted to implement these powers, including the Jones Act."

The pertinent facts relative to the creation and operation of the Bridge Commission may be summarized. The Bridge Commission is a "body corporate and politic." The Commission was created in 1949 pursuant to the General Bridge Act of 1946, 33 U.S.C.A., §§ 525-533, by joint action of the legislatures of Tennessee and Missouri (Chapters 167 and 168 of the Public Acts of 1949 of the Tennessee Legislature, and Revised Statutes of Missouri, Sections 234.360-234.420) and by special act of Congress (Public Law 411, 81st Congress, Chapter 758). Congressional approval was required by Article I, Section 10, Clause 3 of the Constitution of the United States, which provides, "No State shall, without the Consent of Con-

gress * * * enter into any Agreement or Compact with another State * * *." The terms of the interstate compact are set out in full in each of the state acts and in the congressional act of approval. The main function of the Commission is to plan, construct, maintain, and operate an interstate bridge near Caruthersville, Missouri, with authority granted to purchase and operate ferries across the river within 25 miles of the bridge site.

We now consider the question of whether the Commission is an entity separate and apart from the States of Tennessee and Missouri.

In *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, the action was brought against various state officials who constituted the Department of Treasury. The action was dismissed on the basis of sovereign immunity. The Court, in support of its determination that the suit was one against the state, says (p. 464):

> "* * * We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. * * * And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. * * *"

In *Kansas City Bridge Co.* v. *Alabama State Bridge Corp.*, 5 Cir., 59 F.2d 48, the action against the bridge company was held to be one against the state, the court stating (pp. 49-50):

> "It is clear that the whole purpose of the act was to erect bridges essential to the highway system, to pay for them with tolls, and then to make them free for the use of the public. It is well settled that the construction of public roads and bridges is a governmen-

tal function. * * * The state may either perform this function in its own name or through its public officers or one of its governmental agencies. * * * The Alabama Bridge Corporation was but an agency or instrumentality through which the state acted in causing its public bridges to be constructed. It was not a private corporation in any sense of the word, but state officials, who might as well have been designated a board or commission, were ex officio members, and the only members, of it. * * * In the nature of things the state had to choose some such agency in order to effectuate its purpose. * * *".

In *Cargile* v. *New York Trust Co.*, 8 Cir., 67 F.2d 585, the plaintiff brought an action against the members of the Highway Commission of the State of Arkansas, seeking to have a receiver appointed to take charge of a toll bridge. The action was held to be in effect an action against the State of Arkansas and was dismissed for want of jurisdiction. *Copper S. S. Co.* v. *State of Michigan*, 6 Cir., 194 F.2d 465, involved a suit for damages caused by a ferry boat operated across the Mackinac Straits by the State Highway Department. The action was held to be one against the state and was dismissed.

In our present case, it is apparent that the purpose of the States in entering into the compact and in carrying out the authorized activity was to perform their respective governmental obligations to furnish the public with necessary highways and bridges. The defendant Commission was the agency or instrument of the two States and not an entity separate and apart from the States. The Commission could issue no stock. It was controlled by state officials appointed by the respective governors with senate confirmation. Commission action could be authorized only upon a majority vote of the commissioners from each State. Veto power was reserved to the governors. The

Commission's authorized bonds were granted exemption from income taxation. Its revenue from tolls could only be used for reasonable operating expenses and for payment of its bonds and interest, and when the indebtedness was paid the bridge was to belong to the two States and to be operated free of tolls. The Commission afforded no opportunity for realization of private profits to anyone. It had no right to levy taxes. Its tolls were pledged exclusively for operating expenses and bond payments. Aside from the tolls, its only sources of money were the creating States and the Federal Government. It is apparent that a judgment against the Commission and a seizure of the ferry would adversely affect the participating States in the performance of their duty of providing a means of crossing the river.

Plaintiff urges that inasmuch as defendant is a creature of two States, it must be a separate entity. We see no insuperable obstacle to several states using the same instrumentality to carry out a common governmental obligation. As heretofore pointed out, the Constitution of the United States specifically provides for congressional approval of compacts between states. The approval of the compact by Congress at least lends support to the propriety of the States carrying out the project here involved jointly.

Justice Frankfurter and Dean Landis, in an article in 34 Yale Law Journal 685, discuss the compact clause of the Constitution, and in an appendix set out many instances in which compacts have been utilized. The effectiveness of the compact in solving many interstate problems is pointed out. The Port of New York Authority is an example of an interstate compact. This authority was created by New York and New Jersey with the approval of Congress. It performs harbor duties and provides

bridges and tunnels connecting the two States. In *Howell* v. *Port of New York Authority*, D.C. N.J., 34 F.Supp. 797, the compact creating the Authority was discussed. In dismissing the action, the court states (p. 801):

> "The Port Authority, a bi-state corporation * * * is a joint or common agency of the states of New York and New Jersey. It performs governmental functions which project beyond state lines, and it is immune from suit without its consent. * * *"

To the same effect see *Rao* v. *Port of New York Authority*, E.D. N.Y., 122 F.Supp. 595, affd. 2d Cir., 222 F.2d 362.

We are satisfied that the defendant Commission is an instrumentality of both Tennessee and Missouri, and that it is not an entity separate and distinct from the States.

Plaintiff next contends that the States have waived any immunity they might have because of the provision contained in the compact reading as follows:

> "[The Commission] shall have the following powers and duties:
>
> * * *
>
> "3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property * * *."

Some support for plaintiff's contention that there is a tendency to give statutes authorizing suits a liberal construction is found in cases involving corporations created by the Federal Government and in Tort Claims Act suits. However, no such tendency is apparent in cases involving the waiver of sovereign immunity on the part of states. *Porto Rico* v. *Rosaly*, 227 U.S. 270; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47; *Ford Motor Co.* v. *Department of Treasury of Indiana*, *supra*; *Copper S. S. Co.* v.

State of Michigan, supra; Pacific Fruit & Produce Co. v. Oregon Liquor Control Commission, D. C. Ore., 41 F. Supp. 175.

In *Porto Rico* v. *Rosaly, supra*, the issue was whether the sovereign immunity defense was available to Porto Rico. It was contended that the power granted Porto Rico to sue and be sued deprived it of such immunity. The Court conceded that such words standing alone could be so construed, but stated that when they are considered in context they could not be interpreted in such a way as to deprive Porto Rico of such a vital right as sovereign immunity. In the *Read* case, *supra*, the state had authorized suit to recover taxes illegally collected. The statute was construed to limit the waiver to suits in the state court. The Court states (pp. 53-54):

> "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures. * * *"

The Supreme Court has stated that administrative constructions by a state of its statutes of consent influence its conclusions. *Great Northern Life Ins. Co.* v. *Read, supra; Ford Motor Co.* v. *Department of Treasury of Indiana, supra.*

The Supreme Court of Missouri in *Todd* v. *Curators of University of Missouri*, ___ Mo. ___, 147 S.W.2d 1063, 1064, states:

"A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. '* * * But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the state is quite another thing.' *Bush* v. *Highway Commission*, 329 Mo. 843, loc. cit. 849, 46 S.W.2d 854, loc. cit. 856. * * *"

In Tennessee, statutes permitting suits against the State are strictly construed. *State* v. *Cook*, ___ Tenn. ___, 106 S.W.2d 858; *Hill* v. *Beeler*, ___ Tenn. ___, 286 S.W.2d 868.

An application of the law above stated to the undisputed facts before us leads us to the conclusion that the language used in the compact, when considered in context, can not be construed to constitute a waiver of sovereign immunity as to tort liability by the States of Tennessee and Missouri. The words "to sue and be sued" immediately follow the words "to contract." There is no express waiver of tort liability, nor can such a waiver be fairly implied. It is reasonable to assume that the drafters of the compact had in mind the interpretation of their courts to the effect that the grant of a right to sue and be sued did not include a waiver of immunity as to tort liability.

We have determined that the suit was in effect a suit against the States of Tennessee and Missouri, and that neither of said States has waived its sovereign immunity as to tort liability. Under such circumstances, the trial court and this court are without jurisdiction to entertain this action.

Defendant's motion asserts that the action is in effect an action against the States, and that the court has no jurisdiction over the defendant or the subject matter of

the action. While the bar of the Eleventh Amendment to the Constitution of the United States is not specifically asserted, we are inclined to think that the Court's jurisdiction was sufficiently challenged. In any event, we believe that we are obligated to determine whether the Eleventh Amendment deprives this court of jurisdiction.

In *Ford Motor Co. v. Department of Treasury of Indiana, supra*, the Supreme Court states (p. 467):

> "* * * The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

It has uniformly been held that federal judicial power does not extend to any suit in law or equity against a state by citizens of another state even in cases arising under the Constitution or laws of the United States. *Missouri* v. *Fiske*, 290 U.S. 18; *Great Northern Life Ins. Co.* v. *Read, supra; Cargile* v. *New York Trust Co., supra.* In the case last cited this court applies the rule above stated and cites many cases supporting it.

The complaint shows the plaintiff to be a resident of Tennessee. The authorities just cited would bar a tort action against Missouri. The Amendment does not by its terms bar a citizen from suing his own state. However, the Supreme Court has squarely held that a state can not

be sued without its consent in a federal court by one of its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1. In *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 304, footnote 13, the decision in *Hans* v. *Louisiana* is recognized as properly stating the law.

Plaintiff contends that jurisdiction exists because of Article III, Section 2 of the Constitution of the United States providing that judicial power shall extend to all cases in admiralty and maritime jurisdiction. This is the same section of the Constitution which confers jurisdiction over cases arising under the Constitution and laws of the United States. The Court, in the cases heretofore cited, has held that the provision granting jurisdiction over cases arising under the laws of the United States does not give a federal court jurisdiction in a suit by a citizen against a state, and no reason is apparent why the portion of the same section of the Constitution granting admiralty jurisdiction should receive any different treatment.

In *Ex parte State of New York, No. 1*, 256 U.S. 490, the Court held that a state could not be sued in admiralty for maritime tort without its consent. The Court fully discusses the reasons for upholding state immunity, and distinguishes *Workman* v. *New York City*, 179 U.S. 552, relied upon by the plaintiff. Among other things, the Court states (pp. 498, 502-503):

> "* * * In *Hans* v. *Louisiana*, *supra* (p. 15), the court demonstrated the impropriety of construing the Amendment so as to leave it open for citizens to sue their own State in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not."

> "There is no substance in the contention that this result enables the State of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in *Workman* v. *New York City*, 179 U.S. 552, 557-560; * * * The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. * * * It is not inconsistent in principle to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction."

In *Ex parte State of New York, No. 2*, 256 U.S. 503, it was held that a ship owned by New York and used for governmental purposes could not be seized by admiralty process in rem in an action for damages caused by the negligent operation of the ship.

Plaintiff contends that the States are subject to federal laws regulating interstate commerce and maritime matters, and that the Jones Act was enacted pursuant to such powers.

We find nothing in the Jones Act which shows any congressional intention to make its provisions applicable when either the State or Federal Government is the employer. In the comment found in Cumulative Supplement, 46 U.S.C.A. 57, 61, it is stated that the Jones Act applies only to vessels of private ownership or operation. The Federal Government has power to regulate interstate commerce and maritime activities. However, such power is not broad enough to authorize any federal legislation

which would impair the constitutional immunity granted states from suits by citizens against such states in federal courts. If the Jones Act were construed to impose tort liability upon states for injuries to its seaman employees, there is grave danger that such a provision would conflict with the Eleventh Amendment. Ambiguous statutes are generally construed in such a way as to preserve their constitutionality.

United States v. *California*, 297 U.S. 175, relied upon by the plaintiff, is not in conflict with the result we reach. The action in that case was brought by the United States and not by an individual, and hence no conflict with the Eleventh Amendment arises in that case.

We conclude that the trial court, by reason of the provisions of the Constitution, and particularly the Eleventh Amendment, had no jurisdiction of this suit, brought in effect against the States of Tennessee and Missouri. The trial court properly dismissed the action for want of jurisdiction.

Affirmed.

A true copy.

Attest:

Robert C. Tucker,

(Seal) *Clerk, U. S. Court of Appeals, Eighth Circuit.*

APPENDIX "B".
(Judgment.)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15878 - - - September Term, 1957.
Thursday, May 1, 1958.

Naomi Petty, Administratrix of the Estate of Faye R. Petty, Deceased, Appellant,

vs.

Tennessee-Missouri Bridge Commission, a Corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 1st, 1958.

APPENDIX "C".

U. S. Constitution, Article I, Section 8:

> The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U. S. Constitution, Article I, Section 10, cl. 3:

> No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power.

U. S. Constitution, Article III, Section 2:

> The judicial Power shall extend * * * to all cases of admiralty and maritime jurisdiction.

U. S. Constitution, Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Federal Employers Liability Act, 45 U. S. Code 51 *et seq.*

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the

States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, § 1, 35 Stat. 65; August 11, 1939, c. 658, § 1, 53 Stat. 1404.

Merchant Marine Act of 1920, Section 33 (Jones Act), Title 46, U. S. Code, Section 688:

Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal

injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185: June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.

Public Law 411 of the 81st Congress, Chapter 758, H. R. 6109.

Tennessee-Missouri Bridge Commission Compact—Consent, Chapter 758—Public Law 411.

(An Act granting the consent of Congress to a compact or agreement between the State of Tennessee and the State of Missouri concerning a Tennessee-Missouri Bridge Commission, and for other purposes.)

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, THAT:

The consent of Congress is hereby given to the compact or agreement set forth below, and to each and every term and provision thereof: PROVIDED, That any obligations issued and outstanding, including the income derived therefrom, under the terms of a compact or agreement, and any amendments thereto, shall be subject to the tax laws of the United States; AND PROVIDED FURTHER, That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters, or any

commerce between the States or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof: AND PROVIDED FURTHER, That after the costs of the bridge have been amortized, such bridge shall thereafter be maintained and operated free of tolls:

Sec. 234.360.* Compact between Tennessee and Missouri—powers and duties of Tennessee-Missouri Bridge Commission.

Within sixty days after this act becomes effective, the governor, by and with the advice and consent of the senate, shall appoint three commissioners to enter into a compact on behalf of the state of Missouri with the state of Tennessee. If the senate is not in session at the time for making such appointments, the governor shall make temporary appointments as in the case of a vacancy. Any two of the commissioners so appointed together with the attorney general of the state of Missouri may act to enter into the following compact:

Compact Between Tennessee and Missouri Creating a Tennessee-Missouri Bridge Commission.

Article I.

There is hereby created a Tennessee-Missouri Bridge Commission (herein-referred to as the commission) which shall be a body corporate and politic and which shall have the following powers and duties:

---

*This section and subsequent sections bear here the Missouri numbers for convenience in reference. Text of Missouri Statutes identical to Tennessee statutes as well as this Act of Congress.

1. To plan, construct, maintain and operate a bridge and approaches thereto across the Mississippi river at or near Caruthersville, Missouri, at a point deemed by the commission as most suitable to the interests of the citizens of the state of Tennessee and Missouri in accordance with the provisions of an act of the Seventy-ninth Congress, second session, of the United States entitled "The General Bridge Act of 1946", 33 U.S.C.A. 525-533,

2. To purchase, maintain and, in its discretion, to operate all or any ferries across the Mississippi river within twenty-five miles of the site selected for the bridge;

3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property;

4. To acquire by proper condemnation proceedings such real property as may be necessary for the construction and operation of the bridge and the approaches thereto;

5. To issue bonds on the security of the revenues derived from the operation of the bridge and ferries for the payment of the cost of the bridge, its approaches, ferry or ferries, and the necessary lands, easements and appurtenances thereto including interest during construction and all necessary engineering, legal, architectural, traffic surveying and other necessary expenses. Such bonds shall be the negotiable bonds of the commission, the income of which shall be tax-free. The principal and interest of the bonds, and any premiums to be paid for their retirement before maturity, shall be paid solely from the revenues derived from the bridge and ferries;

6. To establish and charge tolls for transit over such bridge and ferries in accordance with the provisions of this compact;

7. To perform all other necessary and incidental functions.

Article II.

The rates of tolls to be charged for transit over such bridge and ferries shall be so adjusted as to provide a fund sufficient to pay for the reasonable cost of maintenance, repairs and operation (including the approaches to the bridge) under economical management, and also to provide a sinking fund sufficient to pay the principal and interest of the outstanding bonds. All tolls and other revenues derived from facilities of the commission are hereby pledged to such uses.

Article III.

The commission shall keep an accurate record of the cost of the bridge and of other expenses and of the daily revenues collected and shall report annually to the governor of each state setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder.

Article IV.

When the bonds have been retired, the part of the bridge within the state of Tennessee shall be conveyed to the state of Tennessee, and that part within the state of Missouri to the state of Missouri, and the high contracting parties to this compact do hereby agree that thereafter the bridge shall be free of tolls and shall be properly maintained, operated and repaired by the two states as may be agreed upon.

Article V.

The commission shall consist of ten members, five of whom shall be qualified electors of the state of Tennessee

and shall reside in Dyer County, or counties adjacent thereto, Tennessee, and five of whom shall be qualified electors of the state of Missouri and shall reside in Pemiscot County, or counties adjacent thereto, Missouri. The Tennessee members are to be chosen by the state of Tennessee, and the Missouri members by the state of Missouri in the manner and for the terms fixed by the legislature of each state, except as herein provided.

Article VI.

1. The commission shall elect from its number a chairman and a vice-chairman and may appoint such officers and employees as it may require for the performance of its duties and shall fix and determine their qualifications and duties.

2. Until otherwise determined by the legislatures of the two states no action of the commission shall be binding unless taken at a meeting at which at least three members from each state are present and unless a majority of the members from each state present at such meeting shall vote in favor thereof.

Each state reserves the right hereafter to provide by law for the exercise of the veto power by the governor thereof over any action of any commissioner appointed therefrom.

Article VII.

The commission is authorized and directed to proceed with the planning and construction of the bridge and the approaches thereto as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers, not inconsistent with the constitution or the laws of the United States or of either state,

to effect the same, except the power to assess or levy taxes.

Article VIII.

In witness thereof, we have hereunto set our hands and seals under authority vested in us by law

(Signed)

(L. 1949, p. 621.)

Sec. 234.370. Commissioners—appointed and qualifications.

Within ninety days after this law becomes effective the governor shall, by and with the advice and consent of the Senate, appoint five commissioners of the Tennessee-Missouri Bridge Commission created by compact between the states of Missouri and Tennessee. If the senate is not in session at the time for making any appointment, the governor shall make a temporary appointment as in the case of a vacancy. All commissioners so appointed shall be qualified voters of the state of Missouri and shall reside within the county of Pemiscot, Missouri, or counties adjacent thereto (L. 1949, p. 625 c/g 1).

Sec. 234.380. Terms of commissioners.

Of the commissioners first appointed one shall be appointed to serve for a term of one year, one for two years, one for three years, one for four years and one for five years. At the expiration of the term of each commissioner and of each succeeding commissioner, the governor shall, by and with the advice and consent of the senate, appoint a successor who shall hold office for a term of five years. Each commissioner shall hold office until his successor has been appointed and qualified (L. 1949, p. 625, c/g 2).

Sec. 234.390. Commission vacancies, how filled.

Vacancies occurring in the office of any commissioner shall be filled by appointment by the governor, by and with the advice and consent of the senate, for the unexpired term. In any case of vacancy, while the senate is not in session, the governor shall make a temporary appointment until the next meeting of the senate, when he shall nominate some person to fill such office (L. 1949, p. 625 c/g 3).

Sec. 234.400. Commissioners to receive expenses only.

The commissioners shall serve without compensation but shall be entitled to be reimbursed for the necessary expenses incurred in the performance of their duties. (L. 1949, p. 625 c/g 4).

234.410. Commissioners, powers and duties.

The commissioners shall have the powers and duties and be subject to the limitations provided for in the compact entered into between the two states, and together with five commissioners from the state of Tennessee shall form the Tennessee-Missouri Bridge Commission (L. 1949, p. 625 c/g 5).

234.420. Commission to be dissolved, when.

Upon the retirement of all bonds, including the payment of interest and other costs, and upon the conveyance of the bridge to the states of Missouri and Tennessee, the commission shall be dissolved and all its rights, powers and duties under this act and under the compact entered into between the states of Missouri and Tennessee, shall be terminated (L. 1949, p. 625 c/g 6).

(Missouri numbering has been used as a matter of convenience in reference beginning with the first section.

of the compact proper, Revised Statutes of Missouri 1949, Section 234.360. P. L. 411, 81st Congress differs from the Missouri and Tennessee Statutes only in respect to matter preceding this section.)

28 U. S. Code 1254 (1):

Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U. S. Code 1331:

Federal question; amount in controversy.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

28 U. S. Code 1333 (1):

Admiralty, maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of
FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

PETITIONER'S BRIEF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

PETITIONER'S BRIEF.

I. OPINIONS BELOW.

A. The opinion of the Court of Appeals for the Eighth Circuit will be found in 254 Federal (2nd) at page 857 (reprinted R. 16-26).

B. The opinion of the District Court is reported in 153 Federal Supplement at page 512 (reprinted R. 12).

II. JURISDICTION.

The jurisdiction of the Court is invoked under 28 U. S. Code 1254 (1). The judgment of the Court of Appeals was entered on May 1, 1958 (R. 27). Petition for Certiorari was filed July 30, 1958. Certiorari was granted October 13, 1958 (R. 27).

III. STATUTES INVOLVED.

(See Appendix for Texts.)

U. S. Constitution, Art. I, Sec. 8 (commerce clause).

U. S. Constitution, Art. I, Sec. 10, cl. 3.

U. S. Constitution, Art. III, Sec. 2.

U. S. Constitution, Amendment XI.

Federal Employers Liability Act, 45 U. S. Code 51 et seq.

Merchant Marine Act of 1920, Sec. 33 (Jones Act), Title 46, U. S. Code, Sec. 688.

Public Law 411 of the 81st Congress, Chap. 758, H. R. 6109.

28 U. S. Code 1254 (1).

28 U. S. Code 1331.

28 U. S. Code 1333 (1).

Chapters 167 and 168, Public Acts of 1949 of the Tennessee Legislature.

Revised Statutes of Missouri, 1949, Sections 234.360 to 234.420.

IV. QUESTIONS PRESENTED.

A. Whether, as a matter of law, a bi-state commission "a body corporate and politic" formed by concurrent action of the legislatures of the two States and the consent of Congress, may avoid liability under the Jones Act (46 U. S. Code 688) for the wrongful death of a member of the crew of its ferry on the theory of sovereign immunity, taking into account:

(1) that among the powers bestowed upon the commission was the power "to contract, to sue and be sued",

(2) that the consent statute of Congress imposes the conditions, among others, that the power and jurisdiction of the various branches of the Federal Government over navigable waters and interstate commerce shall not be impaired,

(3) that the projected activities of the commission included operation of ferries over navigable waters of the United States in interstate commerce and

(4) that the commission did in fact enter into and engage in such activities, in the course of which the casualty occurred.

B. Whether the Courts of the United States are precluded from exercising jurisdiction over a civil action under the Jones Act, 46 U. S. Code 688, in such a situation by the Eleventh Amendment of the United States Constitution, the plaintiff being a citizen of one of the States which are parties to the compact.

V. STATEMENT.

A portion of the opinion of the Court of Appeals (R. 16-18) states the case. This statement of the Court of Appeals is accepted with the several amendments which are inserted parenthetically:

"Plaintiff-administratrix has appealed from final order dismissing her complaint for damages for wrongful death of her decedent. Plaintiff, as administratrix of the estate of her deceased husband, in her complaint (R. 2) asserted that her deceased husband, while employed as a seaman upon a ferry boat operated by the defendant (as a common carrier in interstate commerce) across the Mississippi River between Tiptonville, Tennessee, and Portageville, Missouri, met his death when trapped in the pilot house of the ferry boat as it sank, as the result of a collision with another boat; that her husband's death was caused by the negligence of the defendant; and that recovery of damages is authorized by the Jones Act, 46 U. S. C. A., § 688.

Defendant filed a motion to dismiss (R. 6) based upon the following grounds:

(1)—Because this action is essentially a suit against the States of Tennessee and Missouri, which cannot be maintained in the Courts of the United States, or any other Courts.

(2)—Because this action is in substance and effect one against the States of Tennessee and Missouri, without consent, over which neither the judicial power of the United States or the States of Tennessee or Missouri extends.

(3)—Because this is a suit against an agency created by the sovereign States of Tennessee and Mis-

souri, approved by an Act of Congress, and suits of this class are not permitted by the Constitution and Laws of the States of Tennessee and Missouri, or either of them, and this defendant is immune and not liable in damages in suits of this class.

(4)—Because this Court has no jurisdiction over the person of this defendant, or the subject matter of this action."

The District Court in its decision (R. 12) states that the motion may be treated as a motion for summary judgment.

The trial court sustained the defendant's motion and dismissed the complaint upon the basis that the suit against the defendant was in effect a suit against the States of Tennessee and Missouri, that the defense of sovereign immunity was available to said States, and that such defense had not been waived (R. 12). The appeal challenges the validity of this determination.

Plaintiff in her brief states that defendant's claim of sovereign immunity must be denied for each of the following reasons: (1) defendant is a separate entity from the States of Tennessee and Missouri; (2) the States have waived sovereign immunity; (3) the States, by empowering the Commission to engage in maritime commerce and interstate commerce, "subordinated themselves and it to the Federal Government's power to regulate interstate commerce and its power over matters maritime, and all laws enacted to implement these powers, including the Jones Act."

The pertinent facts relative to the creation and operation of the Bridge Commission may be summarized. The Bridge Commission is a "body corporate and politic" (Appendix, p. A. 4). The Commission was created in 1949 pur-

suant to the General Bridge Act of 1946, 33 U. S. C. A., §§ 525-533, by joint action of the legislatures of Tennessee and Missouri (Chapters 167 and 168 of the Public Acts of 1949 of the Tennessee Legislature, and Revised Statutes of Missouri, Sections 234.360-234.420) and by special act of Congress (Public Law 441, 81st Congress, Chapter 758). Congressional approval was required by Article I, Section 10, Clause 3 of the Constitution of the United States, which provides, "No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State * * *." (The Act of Congress approving the compact as required by the Constitution, was one of **provisional** consent and among its provisions were that "nothing herein contained shall be construed to affect, impair, or diminish any right, power or jurisdiction of the United States or of any Court, department, board, bureau, officer or official of the United States over or in regard to any navigable waters or any commerce between the States or with foreign countries * * * or any other person, matter or thing forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof * * *") (Appendix, pp. A. 3-4). The terms of the interstate compact are set out in full in each of the state acts and in the congressional act of approval. The main function of the Commission is to plan, construct, maintain, and operate an interstate bridge near Caruthersville, Missouri, with authority granted to purchase and operate ferries across the river within 25 miles of the bridge site." (Among the powers conferred upon the Commission by the compact is: Article I, Sec. 3, "To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property.") (Appendix, p. A. 5).

The Court of Appeals affirmed the judgment of the District Court with the following words:

"We conclude that the trial court, by reason of the provisions of the Constitution, and particularly the Eleventh Amendment, had no jurisdiction of this suit, brought in effect against the States of Tennessee and Missouri. The trial court properly dismissed the action for want of jurisdiction (R. 26).

VI. ARGUMENT.

A. Is This a Suit Against the States Themselves?

The petitioner submits that the instant action is not one against the States of Tennessee and Missouri.

If this contention is sound, the Eleventh Amendment to the Constitution is not involved and the problem becomes one of immunity of a public corporation and not that of the States themselves.

The question of whether a suit to which the State is not a party to the record is, in essence, a suit against the State, has frequently been passed upon by this Court, but never in the form in which it is here presented. Previous decisions of this Court have usually dealt with suits against state boards or departments and/or individual state officers or purported officers. **Ford Motor Company v. Department of Treasury of the State of Indiana et al.**, 323 U. S. 459, 464-7, 65 S. Ct. 347, is a recent decision of this Court reviewing earlier decisions. **Ford** involved litigation against a state department and individual state officers. This Court held that since the State of Indiana was called upon to respond financially to the judgment sought, the suit was in essence against the State. On page 464 of the opinion, this Court, speaking through Justice Reed said:

> "* * * We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. **Ex parte Ayers**, 123 U. S. 433, 490, 499, 8 S. Ct. 164, 174, 175, 31 L. Ed. 216; **Ex parte State of New York**, 256 U. S. 496, 500, 41 S. Ct. 588, 590, 65 L. Ed. 1057; **Worcester County Trust Company v. Riley**, 302 U. S. 292, 296, 298, 58 S. Ct. 185, 186, 187, 82 L. Ed. 268. And

when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. **Smith v. Reeves**, supra; **Great Northern Life Insurance Company v. Read**, supra. We are of the opinion, therefore, that the present proceeding was brought in reliance on Section 64-2614 (a) and is a suit against the state."

In re State of New York et al. (1920), 256 U. S. 490, 41 S. Ct. 588, relied upon heavily by the Court below, another case which dealt with a suit against state officers, also recognized the significance of the liability of the state to make satisfaction of any judgment recovered.

In the instant case the opinion of the District Judge (R. 12-13) states that a judgment against the Commission "would operate to affect directly the two sovereigns . . . and if a judgment were rendered against the defendant in this case, the two states and the Federal Government would be responsible. The operation of the defendant is governmental in nature." The Court of Appeals' opinion does not go this far and indeed there is nothing elsewhere in the record to warrant such a conclusion. The latter opinion (R. 20) states:

"It is apparent that a judgment against the Commission and a seizure of the ferry would adversely affect the participating states in the performance of their duty of providing a means of crossing the river", which, of course, is something quite different from a direct pecuniary liability on the part of the states and the Federal Government to satisfy a judgment.

The record is barren as respects any pecuniary responsibility of the states to satisfy a judgment, other than the

gratuitous remarks of the District Judge. The compact nowhere provides for payment by the states of judgments against the Commission. The states to date have not seen fit to enter this litigation, even by way of providing counsel from their respective Attorney General departments. Neither state has participated even to the extent of seeking to became an amicus curiae.

Pecuniary responsibility for the judgment is indeed an important element of a finding that a state is a real party in interest in litigation and it is submitted that in the instant case this element is entirely lacking.

The record provides no basis for concluding that the instant proceeding is in essence a suit against the States of Missouri and Tennessee or either of them.

If the instant case is not a suit against the states themselves, it would seem to be within the rule of this Court in **Workman v. Mayor of New York** (1900), 179 U. S. 552, 557-60, 21 S. Ct. 212, which held that a public corporate body (the City of New York) which had "general capacity to stand in judgment", being "subject to suit and amenable to process" was liable for the commission of maritime torts, notwithstanding a local rule of law extending sovereign immunity from tort actions to municipal corporation for torts committed while performing a governmental function.

In the case at bar the Commission has "general capacity to stand in judgment", being "subject to suit and amenable to process" (Appendix, p. A. 5), and it has committed a maritime tort (R. 3, par. VI). The instant case is indeed much stronger than **Workman**. The vessel there was a fire boat and the "governmental" character of its operation was clear. Here we have a ferry, a common carrier charging fares.

In view of the foregoing, and, especially, under the authority of **Workman**, the Commission has no sovereign immunity from this action.

B. **Express Consent to Be Sued.**

The subsequent decision in **In re State of New York** has cast some doubt on the soundness of the **Workman** decision. The two cases are distinguishable on their facts, as **Workman** involved the City of New York, and not the state per se. **Workman** seems the sounder of the two decisions, for reasons which will be developed later in connection with the question of subordination by states to Federal authority.

It is not necessary, however, to rely upon **Workman** to sustain petitioner's right to sue the respondent, as here we are dealing with an interstate compact, and the conditions imposed by Congress in approving the compact are involved.

The language of the compact, Article I, Section 3, "to contract, to sue and be sued" (Appendix, p. A. 5) seems clear and unambiguous. Local rules of narrow construction, however, of the courts of some states, including both Tennessee and Missouri, have given a different meaning to this language as applied to public corporate bodies; to-wit, that suit is permitted in **contract, but not in tort.** This was the reasoning of the District Judge in sustaining the motion to dismiss, and he relied upon a decision applying the local rule of Missouri.

Long ago, however, this Court decided in **Marlatt's Lessee v. Silk et al.**, 36 U. S. 1, 20, 11 Peters 20, 9 L. Ed. 609, 617, that construction of an interstate compact is a matter of international law, and that no reference should be made to the decisions of the Courts of the States which

are parties respecting their own local rules of construction.

In the instant case not only the intentions of the States, but that of Congress, must be considered. As a condition to approval of the compact, Congress provided explicitly "that nothing contained herein shall be construed to affect, impair or diminish any right, power or jurisdiction of the United States or of any Court, department, board, bureau, officer or official of the United States over or in regard to any navigable waters or any commerce between the states or with foreign countries . . . or any other person, matter or thing forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof" (Appendix, pp. A. 3-4).

In the light of this language, how can it be contended that Tennessee and Missouri have not consented that the Commission—formed pursuant thereto—be subject to suit under laws directly implementing the commerce power and the power over matters maritime of the United States Government?

The Jones Act is such a law, deriving authority from both powers. **O'Donnell v. Great Lakes Dredge and Dock Company**, 318 U. S. 36, 39, 40, 87 L. Ed. 596, 63 S. Ct. 488, 90.

It is submitted that this language of Congress quoted above cannot be reconciled with the narrow interpretation of the words "to sue and be sued" advanced by respondent and upheld by the Courts below. These words should be construed by this Court to mean what they say, which is the only construction consistent with the validity of the compact itself.

This conclusion also disposes of the prob'em of the Eleventh Amendment to the United States Constitution,

raised for the first time by the Court of Appeals (R. 23 et seq.). It is clear that the bar of the Eleventh Amendment may be waived, **Ford Motor Company v. Department of Treasury of Indiana**, 323 U. S. 459, 464-467, 65 S. Ct. 347, and authorities there cited. The acceptance of the conditions imposed by Congress in the consent statute is the clearest kind of waiver of the privilege of the Eleventh Amendment, as well as of the substantive defense of sovereign immunity for the Commission and the States of Tennessee and Missouri themselves.

C. Waiver of Immunity by Conduct.

Even though in a particular case the Court determines that the suit is in effect one against a State, and that the State has not intentionally permitted the particular action involved, it still remains to be determined whether the State has by its conduct waived its sovereign immunity and the procedural protection afforded that immunity by the Eleventh Amendment.

In the instant case the respondent Commission, even if it be regarded as the States of Tennessee and Missouri themselves, can claim no immunity from this action because the States have, in two respects, by their conduct, waived their sovereign immunity, and subjected themselves to the powers of the Federal Government over interstate commerce and matters maritime:

1. Even if it be conceded that the legislatures of Tennessee and Missouri in seeking to establish the Commission did not intend that it should be suable in tort actions, in the light of the conditions imposed by Congress in the consent statute referred to and quoted heretofore—and without which consent the Commission could have no legal existence—the States, in setting up the Commission, have subjected themselves and it to the powers of the Federal

Government over interstate commerce and navigable waters and all laws enacted thereunder, including the Jones Act.

The consent statute speaks for itself (Appendix, pp. A. 3, 4). If it be contended that consent of Congress was subsequent in point of time to the action of the legislatures of Tennessee and Missouri, and that the States did not anticipate the terms and conditions of Congressional consent, they nevertheless proceeded to set up the Commission, permitted it to accept funds from the United States Government, float bonds, etc. (R. 8-10), all of which would have been illegal and null and void under the Constitution except on the terms and conditions laid down by Congress. Their offspring cannot be heard to deny this waiver of sovereign immunity in direct contradiction of the conditions imposed by Congress.

2. Completely aside from the act of approval of Congress and the conditions it imposes, the States of Tennessee and Missouri, by placing the Commission in business as (a) a common carrier in interstate commerce and (b) in actual operation upon navigable waters, have subjected themselves and it to the power of the Federal Government over these areas of activity and the laws of Congress regulating activities in these areas.

In **U. S. v. California** (1936), 297 U. S. 175, 80 L. Ed. 567, 56 S. Ct. 421, the State of California owned and operated a terminal railroad which serviced dock areas in San Francisco harbor. The revenues obtained from charges for its services were used for harbor improvement and thus, in the overall sense, the railroad was a non-profit enterprise, much as in the instant case, where the revenues from the ferry were to be used for paying the interest upon and retiring bonds and for construction of the proposed bridge across the Mississippi River.

The proceeding in the **California** case was an action by the United States to enforce the penalty provisions of the

Safety Appliance Act, 45 U. S. Code, 1 et seq. California pleaded sovereign immunity from such a proceeding. Upon a finding that the railroad was engaged in interstate commerce, this Court held that by **engaging in such activity** California had subordinated itself to the commerce power and statutes enacted thereunder including the Safety Appliance Act.

This Court said (p. 185 of 297 U. S. Reports):

"California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, **Swinson v. Chicago, St. Paul, M. & O. Ry. Co.**, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041, 96 A. L. R. 1136; **Fairport P. & E. R. Co. v. Meredith**, 292 U. S. 589, 594, 54 S. Ct. 826, 78 L. Ed. 1446; **Johnson v. Southern Pacific Co.**, 196 U. S. 1, 17, 25 S. Ct. 158, 49 L. Ed. 363, and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly interstate. **Southern Ry. Co. v. United States**, 222 U. S. 20, 32, S. Ct. 2, 56 L. Ed. 72; **Moore v. Chesapeake & Ohio Ry. Co.**, 291 U. S. 205, 214, 54 S. Ct. 402, 78 L. Ed. 755. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it, should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself

within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection."

This Court (l. c. 183-4) as in the **Workman** case, rejected the distinction sought to be made between "governmental" and proprietary capacities. This distinction figures largely in the opinion of the Court of Appeals (R. 19, 25).

In a subsequent action at law in the California State court by an injured employee of the same railroad under the Federal Employers' Liability Act, 45 U. S. Code 51 et seq. (Appendix, pp. A. 1, 2), companion legislation to the Safety Appliance Act, the appellate court held, specifically following **U. S. v. California**, that California had surrendered its sovereign immunity from suit by a private citizen under the Federal Employers' Liability Act, having subordinated itself to that law as well as the Safety Appliance Act. **Maurice v. State** (1941), 43 Cal. App. 270, 110 P. 2nd 706.

The same rule has obtained with respect to the Railway Labor Act, 45 U. S. Code 151 et seq., **New Orleans Public Belt Railroad Commission v. Ward**, C. A. 5 (1952), 195 F. 2nd 829; **Taylor v. Fee**, C. A. 9 (1956), 233 F. 2nd 251, 256. The latter case cites with approval **Maurice v. State**, supra.

The Jones Act, which is involved in the instant case, as has been pointed out, derives from both the commerce power and the power over matters maritime, Article III, Section 2, Constitution of the United States. **O'Donnell v. Great Lakes Dredge and Dock Company**, supra. It is "remedial legislation," designed to "protect employees" from, and compensate them in the event of, injuries, and is construed liberally in favor of injured seamen. **Garrett v. Moore McCormack**, 317 U. S. 239, 63 S. Ct. 246; **O'Donnell v. Great Lakes Dredge & Dock Company**, supra; **So-**

cony-Vacuum Company v. Smith, 305 U. S. 424, 59 S. Ct. 252; **Panama Railroad Company v. Johnson**, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748.

The Jones Act is the maritime equivalent of the Federal Employers' Liability Act, 45 U. S. Code 51 et seq., all applicable provisions of which are incorporated by reference (Appendix, pp. A. 2, 3).

The Court of Appeals approached the Jones Act as follows (R. 25):

> "We find nothing in the Jones Act which shows any congressional intention to make its provisions applicable when either the state or Federal Government is the employer."

When this Court dealt with the analogous problem in **California** it said (p. 185 of 297 U. S. Reports):

> "No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the Act when a state, as well as a privately owned carrier brings itself within the sweep of the statute, or why its all embracing language should not be deemed to afford that protection."

The rule of **U. S. v. California** should be applied here.

It is thus demonstrated that by their conduct the States of Tennessee and Missouri and their offspring, the Commission, have doubly subjected themselves to the power of the United States Government over interstate commerce and matters maritime and all laws enacted thereunder, including the Jones Act.

As has been previously pointed out, the privilege and protection afforded States by the Eleventh Amendment

may be waived. In the light of the waiver by conduct demonstrated above, no immunity exists as respects this action, even if it be regarded as one, in essence, against the States of Tennessee and Missouri themselves.

VII. CONCLUSION.

For the foregoing reasons, and with particular emphasis on (1) the acceptance of or submission to the conditions imposed by the consent statute of Congress and (2) the actual engaging in interstate commerce upon navigable waters of the United States, the States of Tennessee and Missouri should be held to have waived for themselves and the respondent Commission any immunity from liability under the Jones Act in general and in particular the privilege of the Eleventh Amendment as respects this proceeding in the Courts of the United States.

The judgment of the Court of Appeals for the Eighth Circuit should be reversed and the cause should be remanded to the District Court for the Eastern District of Missouri, Southeastern Division.

Respectfully submitted,

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APPENDIX.

U. S. Constitution, Article I, Section 8:

The Congress shall have Power * * * to regulate Commerce with foreign nations and among the several States, and with the Indian Tribes.

U. S. Constitution, Article I, Section 10, cl. 3:

No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power.

U. S. Constitution, Article III, Section 2:

The judicial Power shall extend * * * to all cases of admiralty and maritime jurisdiction.

U. S. Constitution, Amendment XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Federal Employers Liability Act, 45 U. S. Code 51 et seq.

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations,

shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, § 1, 35 Stat. 65; August 11, 1939, c. 658, § 1, 53 Stat. 1404.

Merchant Marine Act of 1920, Section 33 (Jones Act), Title 46, U. S. Code, Section 688:

Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman

may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.

Public Law 411 of the 81st Congress, Chapter 758, H. R. 6109.

Tennessee-Missouri Bridge Commission Compact—Consent, Chapter 758—Public Law 411.

(An act granting the consent of Congress to a compact or agreement between the State of Tennessee and the State of Missouri concerning a Tennessee-Missouri Bridge Commission, and for other purposes.)

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That:

The consent of Congress is hereby given to the compact or agreement set forth below, and to each and every term and provision thereof; Provided, That any obligations issued and outstanding, including the income derived therefrom, under the terms of a compact or agreement, and any amendments thereto, shall be subject to the tax laws of the United States; And Provided Further, That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any Court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters, or any commerce between the States or with foreign countries, or any bridge, railroad, highway,

pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof: And Provided Further, That after the costs of the bridge have been amortized, such bridge shall thereafter be maintained and operated free of tolls:

Compact between Tennessee and Missouri—powers and duties of Tennessee-Missouri Bridge Commission.

Within sixty days after this act becomes effective, the governor, by and with the advice and consent of the senate, shall appoint three commissioners to enter into a compact on behalf of the state of Missouri with the state of Tennessee. If the senate is not in session at the time for making such appointments, the governor shall make temporary appointments as in the case of a vacancy. Any two of the commissioners so appointed together with the attorney general of the state of Missouri may act to enter into the following compact:

Compact Between Tennessee and Missouri Creating a Tennessee-Missouri Bridge Commission.

Article I.

There is hereby created a Tennessee-Missouri Bridge Commission (herein referred to as the commission) which shall be a body corporate and politic and which shall have the following powers and duties:

1. To plan, construct, maintain and operate a bridge and approaches thereto across the Mississippi river at or near Caruthersville, Missouri, at a point deemed by the commission as most suitable to the interests of the citizens of the states of Tennessee and Missouri in accordance with the provisions of an act of the Seventy-ninth Congress,

second session, of the United States, entitled "The General Bridge Act of 1946", 33 U. S. C. A. 525-533;

2. To purchase, maintain and, in its discretion, to operate all or any ferries across the Mississippi river within twenty-five miles of the site selected for the bridge;

3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property;

4. To acquire by proper condemnation proceedings such real property as may be necessary for the construction and operation of the bridge and the approaches thereto;

5. To issue bonds on the security of the revenues derived from the operation of the bridge and ferries for the payment of the cost of the bridge, its approaches, ferry or ferries, and the necessary lands, easements and appurtenances thereto including interest during construction and all necessary engineering, legal, architectural, traffic surveying and other necessary expenses. Such bonds shall be the negotiable bonds of the commission, the income of which shall be tax-free. The principal and interest of the bonds, and any premiums to be paid for their retirement before maturity, shall be paid solely from the revenues derived from the bridge and ferries;

6. To establish and charge tolls for transit over such bridge and ferries in accordance with the provisions of this compact;

7. To perform all other necessary and incidental functions.

Article II.

The rates of tolls to be charged for transit over such bridge and ferries shall be so adjusted as to provide a

fund sufficient to pay for the reasonable cost of maintenance, repairs and operation (including the approaches to the bridge) under economical management, and also to provide a sinking fund sufficient to pay the principal and interest of the outstanding bonds. All tolls and other revenues derived from facilities of the commission are hereby pledged to such uses.

Article III.

The commission shall keep an accurate record of the cost of the bridge and of other expenses and of the daily revenues collected and shall report annually to the governor of each state setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder.

Article IV.

When the bonds have been retired, the part of the bridge within the state of Tennessee shall be conveyed to the state of Tennesse, and that part within the state of Missouri to the state of Missouri, and the high contracting parties to this compact do hereby agree that thereafter the bridge shall be free of tolls and shall be properly maintained, operated and repaired by the two states as may be agreed upon.

Article V.

The commission shall consist of ten members, five of whom shall be qualified electors of the state of Tennessee and shall reside in Dyer County, or counties adjacent thereto, Tennessee, and five of whom shall be qualified electors of the state of Missouri and shall reside in Pemiscot County, or counties adjacent thereto, Missouri. The Tennessee members are to be chosen by the state of Ten-

nessee, and the Missouri members by the state of Missouri in the manner and for the terms fixed by the legislature of each state, except as herein provided.

Article VI.

1. The commission shall elect from its number a chairman and a vice-chairman and may appoint such officers and employees as it may require for the performance of its duties and shall fix and determine their qualifications and duties.

2. Until otherwise determined by the legislatures of the two states no action of the commission shall be binding unless taken at a meeting at which at least three members from each state are present and unless a majority of the members from each state present at such meeting shall vote in favor thereof.

Each state reserves the right hereafter to provide by law for the exercise of the veto power by the governor thereof over any action of any commissioner appointed therefrom.

Article VII.

The commission is authorized and directed to proceed with the planning and construction of the bridge and the approaches thereto as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers, not inconsistent with the constitution or the laws of the United States or of either state, to effect the same, except the power to assess or levy taxes.

Article VIII.

In witness thereof, we have hereunto set our hands and seals under authority vested in us by law.

(Signed)

Commissioners—appointed and qualifications.

Within ninety days after this law becomes effective the governor shall, by and with the advice and consent of the Senate, appoint five commissioners of the Tennessee-Missouri Bridge Commission created by compact between the states of Missouri and Tennessee. If the senate is not in session at the time for making any appointment, the governor shall make a temporary appointment as in the case of a vacancy. All commissioners so appointed shall be qualified voters of the state of Missouri and shall reside within the county of Pemiscot, Missouri, or counties adjacent thereto (L. 1949, p. 625 c/g 1).

Terms of commissioners.

Of the commissioners first appointed one shall be appointed to serve for a term of one year, one for two years, one for three years, one for four years and one for five years. At the expiration of the term of each commissioner and of each succeeding commissioner, the governor shall, by and with the advice and consent of the senate, appoint a successor who shall hold office for a term of five years. Each commissioner shall hold office until his successor has been appointed and qualified (L. 1949, p. 625, c/g 2).

A.

Commission vacancies, how filled.

Vacancies occurring in the office of any commissioner shall be filled by appointment by the governor, by and with the advice and consent of the senate, for the unexpired term. In any case of vacancy, while the senate is not in session, the governor shall make a temporary appointment until the next meeting of the senate, when he shall nominate some person to fill such office.

Commissioners to receive expenses only.

The commissioners shall serve without compensation but shall be entitled to be reimbursed for the necessary expenses incurred in the performance of their duties.

Commissioners, powers and duties.

The commissioners shall have the powers and duties and be subject to the limitations provided for in the compact entered into between the two states, and together with five commissioners from the State of Tennessee shall form the Tennessee-Missouri Bridge Commission.

Commission to be dissolved, when.

Upon the retirement of all bonds, including the payment of interest and other costs, and upon the conveyance of the bridge to the states of Missouri and Tennessee, the commission shall be dissolved and all its rights, powers, and duties under this act and under the compact entered into between the states of Missouri and Tennessee, shall be terminated.

28 U. S. Code 1254 (1):

Courts of appeals; certiorari; appeal, certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1 By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U. S. Code 1331:

Federal question; amount in controversy.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

28 U. S. Code 1333 (1):

Admiralty, maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to the libelant or petitioner in every case any other remedy to which he is otherwise entitled.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of
FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

RESPONDENT'S OPPOSING BRIEF TO GRANTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of FAYE R. PETTY, Deceased,
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vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION, a Corporation,
Respondent.

RESPONDENT'S OPPOSING BRIEF TO GRANTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF ADDITIONAL FACTS.

1—Petition for Certiorari does not fully set out the reasons contained in Motion to Dismiss on account of im-

munity for tort action. See Record page 7, wherein it is alleged that Respondent Commission is an immediate agency and arm of the sovereign states of Tennessee and Missouri whose sole powers and duties are to plan, construct, maintain and operate a bridge at or near Caruthersville and ferries across the Mississippi River within a radius of twenty-five miles of Caruthersville, Missouri, as an agency of Tennessee, Missouri and the United States, and pay for the same by tolls, and the title thereto to become vested in the states of Tennessee and Missouri when the costs thereof have been paid.

2—Attached to the foregoing Motion to Dismiss on account of immunity for tort action was an affidavit of the Secretary and General Manager of Respondent Commission (Record page 9). Among other things the following is set up in said affidavit:

(a) Par. 5 of the affidavit alleges that Respondent Commission had entered into a contract with the Secretary of the Treasury of the United States in which the status of Respondent Commission as a governmental agency was recognized and that the interest income on all of the bonds which might be issued by said Commission would be exempt from federal income taxes.

(b) In Par. 6 of the affidavit it was alleged that Tennessee, Missouri and the United States had allocated the sum of $100,000.00 to Respondent Commission for the uses and purposes enjoined upon the Commission by the acts of the legislatures aforesaid and the act of Congress, and approximately $48,000.00 of said allocation had been expended under the orders of Respondent Commission.

(c) In Par. 7 of the affidavit it was alleged that pursuant to the powers and duties enjoined upon the Commission by the legislative acts the Commission had purchased and acquired title to the Tiptonville

Ferry being the instrumentality upon which deceased lost his life, and Respondent Commission had by resolution approved and issued its revenue tax free bonds in the amount of $200,000.00 bearing interest at the rate of 5% per annum for the purpose of paying the purchase price of the ferry, and that the sum of $180,000.00 of said bonds were still outstanding and unpaid, and all of the ferry property and the income therefrom was pledged to secure the payment of said revenue bonds and the interest accruing thereon.

(d) In Par. 8 of the affidavit it was alleged that Respondent Commission had at no time transacted any business except that which it was authorized to transact by the legislative acts aforesaid.

3—In the trial of this case in the District Court evidence was introduced in support of all of the matters of fact set out in the Motion to Dismiss as well as in the affidavit annexed thereto, and Petitioner offered no evidence to the contrary. See printed Record page 12.

REASONS TO DISALLOW WRIT.

1—There is no special or important reason why Writ should issue (Rule 19), and no principle of public importance is involved in this private action instituted by Petitioner.

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 99 L.ed. 897, 75 S.Ct. 614.

Layne & Bowler Corp. v. *Western Well Works*, 261 U.S. 387, 67 L.ed. 712, 43 S.Ct. 422.

2—The decision of the District Court (153 F.Supp. 512), as well as the Court of Appeals (254 F.2d 857), is in harmony with other Federal Court decisions. Petitioner does not claim a conflict.

3—The opinion of the Court below follows *Ex parte State of New York*, 256 U.S. 490, 65 L.ed. 1057, the last controlling decision of this Court on governmental immunity in maritime tort. The opinion is also in harmony with *Ex parte State of New York*, 256 U.S. 503, 65 L.ed. 1063. *United States* v. *California*, 297 U.S. 175, 80 L.ed. 567, has no application here for the reason this is a suit by an individual against an agency of the sovereign.

4—The Acts creating the Respondent Commission giving it the capacity "to sue and be sued" is not a waiver of governmental immunity for tort action.

Todd v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063.

State v. *Cook*, 106 SW2d 858 (Tenn.).

ARGUMENT.

I.

Reasons to Disallow Writ.

1—There is no special or important reason why the decision of the lower court in this case should be reviewed. There is no claim that the decision of the Court of Appeals is in conflict with any other Court of Appeals, and Petitioner admits that the decision of the lower Court is in harmony with the last controlling decision of this Court.

In the recent decision of this Court in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 99 L.ed. 897, you quoted with approval the following from *Layne and Bowler Corp.* v. *Western Well Works*, 261 U.S. 387:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very

important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

2—As to the immunity of a state for maritime tort we take the following quotation from *In re The State of New York*, 256 U.S. 490 (65 L.ed. l.c. 1063):

"There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in Workman v. New York, 179 U.S. 552, 557-560. * * * The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law (503) as a body of substantive law, operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. Chelentix v. Luckenbach S. S. Co., 247 U.S. 372, 382, 384, 62 L.ed. 1171, 1175, 1176, 38 Sup. Ct. Rep. 501. It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the Courts of admiralty and maritime jurisdiction.

The want of authority in the Disctrict Court to entertain these proceedings in personam under Rule 59 (now 56), brought by the claimants against Mr. Walsh as superintendent of public works of the State of New York, is so clear, and the fact that the proceedings are in essence suits against the state without its consent is so evident, that instead of permitting them to run their slow course to final decree, with in-

evitable futile result, the writ of prohibition should be issued as prayed."

We also call the attention of the Court to another opinion of this Court, *Ex parte State of New York*, 256 U.S. 503, 65 L.ed. l.c. 1066, where this Court stated:

> "The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state, used and employed for public and governmental purposes.
>
> Upon the facts shown, the Queen City is exempt, and the prohibition should be issued.
>
> Rule absolute for a writ of prohibition."

II.

Respondent Commission Is a Governmental Agency.

The Commission is an agency or instrument of the States of Tennessee and Missouri and is not an entity separate and apart from the states. The Commission has no capital stock, and is controlled by state officials appointed by the respective Governors with Senate confirmation. Veto power was reserved to the Governors. The Commission is authorized to issue bonds exempt from income taxes. Its revenue from tolls can only be used for reasonable operating expenses and for payment of its bonds and interest, and when the indebtedness is paid the bridge is to belong to the two states and operated free of tolls. Its income is pledged exclusively for operating expenses and bond payments. The Commission was authorized by Legislative Acts to furnish the public with necessary highways and bridges which is a governmental function.

Respondent Commission is somewhat like the Port of New York Authority, which was created by New York and New Jersey with the approval of Congress, and which performs duties pertaining to harbors, bridge and tunnels connecting the two states. In *Howell* v. *Port of New York Authority*, 34 F. Supp. 795, the District Court, N. J., at l.c. 801, said:

> "The Port Authority, a bi-state corporation * * * is a joint or common agency of the states of New York and New Jersey. It performs governmental functions which project beyond state lines, and it is immune from suit without its consent."

The decision in *Rao* v. *Port of New York Authority*, E.D.N.Y., 122 F. Supp. 595, which was affirmed in 222 F.2d 362, is to the same effect.

We do not find that there is a controlling decision of any Federal Court to the contrary.

III.

Power to Sue and Be Sued.

The Legislative Acts creating the Respondent Commission among other things provides that it shall have the following powers:

> "3. To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property * * *."

There are numerous Acts of the Legislatures of the two States providing that various agencies, political subdivisions, etc., shall have the power to sue and be sued. These Acts were on the statute books at the time the Bridge Commission was set up, and had been for a great many years. Nevertheless, the Courts of Tennessee and

Missouri have held that these Commissions, agencies and political sub-divisions were immune from tort action. *Todd* v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063; *State* v. *Cook*, 106 SW2d 858, Tennessee.

In *Todd* v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063, l.c. 1064, Judge Clerk for the Supreme Court sufficiently answered this argument:

> "A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit against it for negligence. '* * * But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the state is quite another thing.'" Citing many cases.

If the Legislatures of Tennessee and Missouri intended to give consent for the institution of tort actions against the Bridge Commission they would have done so in appropriate terms (See: Fed. Tort Claim Act, 28 U.S.C.A. 1346 and 2674). The authorization for this Commission to sue and be sued is limited to those contractual obligations which it is authorized to enter into, and there was no intent to authorize it to be sued in tort.

The rule of governmental immunity for tort actions to all sub-agencies, commissions, or corporations set up by the sovereign to perform governmental functions, such as the Respondent Commission here has been applied to all state agencies.

(a) In Missouri the State Highway Commission was set up by the Legislature to build and maintain highways throughout the state, and is an agency similar to the defendant Commission. The State Highway Commission is immune from suit for torts.

Bush v. *State Highway Commission*, 329 Mo. 843, 46 SW2d 854.

Hill-Behan Lbr. Co. v. *Highway Commission*, 347 Mo. 671, 148 SW2d 499.

(b) The various counties in the State of Missouri are immune from tort action.

Swineford v. *Franklin County*, 73 Mo. 279.

Zoll v. *St. Louis County*, 343 Mo. 1061, 124 SW2d 1168.

(c) Cities are immune from tort action growing out of matters connected with their governmental powers.

Richardson v. *City of Hannibal*, 330 Mo. 398, 50 SW2d 648, 84 A.L.R. 508.

(d) Organized townships in the various counties in the State of Missouri are immune from tort action.

Cullor v. *Jackson Township*, 249 SW2d 393 (Mo. Sup.).

(e) The various school districts in the State of Missouri are immune from tort action.

Meadow Park Land Co. v. *School Dist.*, 301 Mo. 688, 257 SW 441.

Cochran v. *Wilson*, 287 Mo. 210, 229 SW 1050.

(f) The various colleges and universities in the State of Missouri, and which have boards and commissions to manage and control them, are immune from tort action.

Todd v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063.

(g) The various special road districts existing all over the State of Missouri are immune from tort action.

Sharp v. *Kurth*, 245 SW 636.

(h) Drainage and levee districts which are organized and controlled by local boards and supervisors are not liable in tort action.

State ex rel. v. *Allen*, 298 Mo. 448, 250 SW 905.

Kyle v. *St. Francis Levee District*, 153 SW2d 391.

Tant v. *Little River Drainage District*, 210 Mo. App. 420, 238 SW 848.

(i) This doctrine of immunity has been extended and applied to charitable institutions, even though the sovereign has nothing to do with them.

Dille v. *St. Lukes Hospital*, 196 SW2d 615, 355 Mo. 436.

Eads v. *Y. W. C. A.*, 325 Mo. 577, 29 SW2d 701.

(j) This rule of immunity from tort action enjoyed by political sub-divisions and political corporations is applied in Tennessee.

Rogers v. *Butler*, 170 Tenn. 125.

Taylor v. *Coble*, 28 Tenn. App. 167, 187 SW2d 648.

Williams v. *Morristown*, 32 Tenn. App. 274, 222 SW2d 607.

City of Kingsport v. *Lane*, 243 SW2d 289.

The above is the rule in Tennessee and Missouri even though the Legislative Acts creating the agencies, commissions or corporations gave them the power to sue and be sued. See R. S. Mo. 1949, Sections 245.290, 233.025, 233.170, 226.100, 165.263, and 287.590.

CONCLUSION.

The opinion and decision of the United States Court of Appeals for the Eighth Circuit in this case cites numerous decisions from the various Federal Courts, State Courts and this Court in support thereof, and we urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JAMES M. REEVES,
Caruthersville, Missouri,
WARD & REEVES,
Caruthersville, Missouri,
Attorneys for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of
FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

RESPONDENT'S BRIEF.

JAMES M. REEVES,
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IN THE

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OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

RESPONDENT'S BRIEF.

STATEMENT.

Respondent adopts the Statement of Facts contained in Petitioner's Brief, but desires to supplement the Statement with the following admitted facts:

Respondent Commission is controlled by State Officials appointed by the respective governors with Senate con-

firmation, and veto power is reserved to the governors. The Commission is authorized to issue revenue bonds, and the tolls from the operation of the bridge or ferries could be used only for operating expenses and for the payment of the bonds and interest. When the bridge is constructed and all bonds are paid, the bridge shall become the property of the two states, and shall be operated free of tolls. The Treasury Department of the United States has recognized the Respondent Commission as a governmental agency and the interest income on all of its bonds is exempt from Federal Income Taxes (R. 9).

ARGUMENT.

I.

Sovereign Cannot Be Sued.

It is an established principle of jurisprudence in all civilized nations, resting upon grounds of public policy, that the sovereign cannot be sued in its own Courts or in any other Court without its consent.

Great Northern Life Ins. Co. v. *Read*, 322 U.S. 47, 88 L. Ed. 1121.

Walker v. *Felmont Oil Corp.*, 240 F. 2d 912 (6th Cir.).

49 Am. Jur., p. 301, Sec. 91.

81 C.J.S., p. 1300, Sec. 214.

(a) This has always been the law respecting the immunity of the United States.

United States v. *U. S. F. & G. Co.*, 309 U.S. 506, 84 L. Ed. 894.

(b) This has always been the rule in the State of Tennessee.

Automobile Sales Co. v. *Johnson*, 174 Tenn. 38, 122 SW2d 453, 120 A.L.R. 370.

(c) This rule likewise has always been recognized as the law of Missouri.

Nacy v. *LePage*, 341 Mo. 1039, 111 SW2d 25, 114 A.L.R. 259.

II.

Immunity Applies to Commissions, Agencies and Corporations Set Up by Sovereign to Perform Governmental Functions.

Following the general rule laid down *supra*, this immunity has been extended in tort actions to all commissions, sub-agencies, or corporations set up by the sovereign to perform governmental functions, such as the defendant Commission here.

(a) In Missouri the State Highway Commission was set up by the Legislature to build and maintain highways throughout the state, and is an agency similar to the defendant Commission. The State Highway Commission is immune from suit for torts.

Bush v. *State Highway Commission*, 329 Mo. 843, 46 SW2d 854.

Hill-Behan Lbr. Co. v. *Highway Commission*, 347 Mo. 671, 148 SW2d 499.

(b) The various counties in the State of Missouri are immune from tort action.

Swineford v. *Franklin County*, 73 Mo. 279.

Zoll v. *St. Louis County*, 343 Mo. 1061, 124 SW2d 1168.

(c) Cities are immune from tort action growing out of matters connected with their governmental powers.

Richardson v. *City of Hannibal*, 330 Mo. 398, 50 SW2d 648, 84 A.L.R. 508.

(d) Organized townships in the various counties in the State of Missouri are immune from tort action.

Cullor v. *Jackson Township*, 249 SW2d 393 (Mo. Sup.).

(e) The various school districts in the State of Missouri are immune from tort action.

Meadow Park Land Co. v. *School Dis.*, 301 Mo. 688, 257 SW 441.

Cochran v. *Wilson*, 287 Mo. 210, 229 SW 1050.

(f) The various colleges and universities in the State of Missouri, and which have boards and commissions to manage and control them, are immune from tort action.

Todd v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063.

(g) The various special road districts existing all over the State of Missouri are immune from tort action.

Sharp v. *Kurth*, 245 SW 636.

(h) Drainage and levee districts which are organized and controlled by local boards and supervisors are not liable in tort action.

State ex rel. v. *Allen*, 298 Mo. 448, 250 SW 905.

Kyle v. *St. Francis Levee District*, 153 SW2d 391.

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(i) This doctrine of immunity has been extended and applied to charitable institutions, even though the sovereign has nothing to do with them.

Dille v. *St. Luke's Hospital*, 196 SW2d 615, 355 Mo. 436.

Eads v. *Y. W. C. A.*, 325 Mo. 577, 29 SW2d 701.

(j) This rule of immunity from tort action enjoyed by political sub-divisions and political corporations is applied in Tennessee.

Rogers v. *Butler*, 170 Tenn. 125.

Taylor v. *Coble*, 28 Tenn. App. 167, 187 SW2d 648.

Williams v. *Morristown*, 32 Tenn. App. 274, 222 SW2d 607.

City of Kingsport v. *Lane*, 243 SW2d 289 (Tenn.).

III.

Consent Not Given to Be Sued.

Petitioner contends that Legislative Acts creating respondent Commission gave consent for the Commission to be sued. The provision referred to is as follows: "To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property." (Petitioner's Brief, Clause 3, page 23).

The Legislative Acts creating respondent Commission were passed and approved in the year 1949. At that time many prior Legislative Acts creating commissions, political sub-divisions, sub-agencies, etc., were on the statute books, giving such commissions, political sub-divisions, sub-agencies, etc., power to sue and be sued.

Section 245.290, R. S. Mo. 1949, provides that a levee district shall have the power to sue and be sued.

Section 233.025 and Section 233.170, R. S. Mo. 1949, provides that the two types of road districts shall have the power to sue and be sued.

Section 226.100, provides that State Highway Commission shall have the power to sue and be sued.

Section 165.263, R. S. Mo. 1949, provides that school districts shall have the power to sue and be sued.

Section 287.590, provides that the Workmen's Compensation Commission shall have the power to sue and be sued.

In *Todd* v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063, l.c. 1064, Judge Clark for the Supreme Court sufficiently answered this argument:

> "A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit

against it for negligence. '* * * But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the state is quite another thing.'" Citing many cases.

If the Legislatures of Tennessee and Missouri intended to give consent for the institution of tort actions against the Bridge Commission they would have done so in appropriate terms (See: Fed. Tort Claim Act, 28 U.S.C.A. 1346 and 2674). The authorization for this Commission to sue and be sued is limited to those contractual obligations which it is authorized to enter into, and there was no intent to authorize it to be sued in tort.

We are dealing here with a contract between the states of Missouri and Tennessee and it is a uniform rule of law that when an Act of a Legislature is passed using a phrase or term already interpreted by the Courts, it is conclusively presumed that the legislative body had in mind the interpretations given by the courts, and applying that rule in this case it must be conclusively presumed that the States of Missouri and Tennessee did not intend to waive the immunity of the bridge commission by merely stating that it would have the power to sue and be sued. That phrase is only applicable to those acts and undertakings which were enjoined upon the commission by the laws creating the commission, and certainly there was no intent that such phrase would go to the extent of making the commission liable for torts of its employees.

There are no Federal decisions which overturn the interpretation given by our own courts, and upon the question of determining the intent of the two legislatures in using the phrase "may sue and be sued" the Federal Courts are bound by the interpretation given by the state courts. We do not controvert the fact that if this case ever gets to

the trial stage then the merits of the case will be governed by maritime law under the Jones Act, which embraces the Federal Employers Liability Act. The interpretation of the meaning of the acts of the two legislatures is not a federal question, but is governed by the interpretation given by the state courts whether or not they did or did not waive governmental immunity.

IV.

This Is Essentially a Suit Against States.

(a) The sole and only function of the defendant in this case is to operate ferries, build a bridge, issue revenue bonds, collect tolls to pay said bonds, and when the indebtedness is paid, turn the property over to the two states. The Commission is set up by the two states to perform a governmental function. The law of Tennessee and Missouri is clear that the building and maintaining of bridges and roads is a governmental function. This is likewise the Federal Rule, and the Federal Courts have uniformly held that agencies, whether they are of one state or of more than one state, such as the defendant here, are immune from tort action.

Kansas City Bridge Co. v. *Alabama State Bridge Corporation*, 59 F. 2d 48 (5th Cir.), cert. denied 287 U.S. 644.

Howell v. *Port of New York Authority*, 34 F. Supp. 797.

Armacost v. *Conservation Commission*, 126 F. Supp. 414.

Dupont v. *South Carolina Public Service Authority*, 100 F. Supp. 778.

(b) Whatever judgment that may hereafter be recovered in this case directly affects property of the states of Tennessee and Missouri because Respondent Commission is acting for and on behalf of the two states to acquire and pay for a bridge across the Mississippi River connecting

the highway systems of the two states which is to become the property of the two states. Therefore, respondent Commission is not an entity separate and apart from the two states.

In *Ford Motor Company* v. *Department of Treasury of Indiana*, 323 U.S. 459, 89 L. Ed. 389, l.c. 394, this Court stated: "We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding", citing many authorities.

To the same effect are the following cases:

Great Northern Life Insurance Company v. *Read*, 322 U.S. 47, 88 L. Ed. 1121.

Oklahoma Real Estate Commission v. *National Business, etc.*, 229 F. 2d 205 (10th Cir.).

Annotation 62 A.L.R.2d 1222.

V.

Maritime Tort No Exception to Non-Liability.

(a) Petitioner contends that the operation of a ferry across the Mississippi River by respondent Commission makes respondent liable in tort under the Jones Act.

We have pointed out above that this is essentially a suit against the two states and that consent to be sued in tort has not been given. Therefore, without statutory authority there can be no liability for maritime torts committed by vessels owned by the sovereign, or its agents in the performance of statutory duties.

In *United States* v. *Thompson*, 257 U.S. 419, 66 L. Ed. 299, Mr. Justice Holmes for this Court in ruling upon this question stated:

> "It may be assumed that each of these vessels might have been libeled for maritime torts committed

after the redelivery that we have mentioned. But the Act of September 7, 1916, chap. 451, § 9, does not create a liability on the part of the United States, retrospectively, where one did not exist before. Neither, in our opinion, is such a liability created by the Act of March 9, 1920, chap. 95, § 4, authorizing the United States to assume the defense in suits like these. It is not required to abandon any defense that otherwise would be good. It appears to us plain that, before the passage of these acts, neither the United States nor the vessels in the hands of the United States, were liable to be sued for these alleged maritime torts."

(b) The Courts of the United States have uniformly held that without statutory authority the states, municipalities and commissions are immune from maritime tort actions.

In re The State of New York, 256 U.S. 490, 65 L. Ed. 1057.

In re The State of New York, 256 U.S. 503, 65 L. Ed. 1063.

Copper S. S. Co. v. *State of Michigan*, 194 F. 2d 465 (6th Cir.).

Banks v. *Liverman*, 226 F. 2d 524 (4th Cir.).

Schlmeyer v. *Romeo Co.*, 117 F. 2d 996 (9th Cir.).

On page 10 of Petitioner's Brief it is stated that the rule laid down in *Workman* v. *Mayor of New York*, 179 U.S. 552, should be applied. The Workman case was distinguished if not in fact overruled by the later decision in *The State of New York*, 256 U.S. 490, 65 L. Ed. 1057. We take the following quotation from the unanimous decision of this Court in the latter case, 65 L. Ed. l.c. 1063:

"There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the

rules of maritime law insisted upon in Workman v. New York, 179 U.S. 552, 557-560. * * * The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law (503) as a body of substantive law, operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. Chelentix v. Luckenbach S. S. Co., 247 U.S. 372, 382, 384, 62 L. Ed. 1171, 1175, 1176, 38 Sup. Ct. Rep. 501. It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

The want of authority in the District Court to entertain these proceedings in personam under Rule 59 (now 56), brought by the claimants against Mr. Walsh as superintendent of public works of the state of New York, is so clear, and the fact that the proceedings are in essence suits against the state without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitable futile result, the writ of prohibition should be issued as prayed."

We also wish to call the attention of the Court to the case of *In re State of New York*, 256 U.S. 503, 65 L. Ed. 1063, wherein the opinion of the Court concluded as follows, 65 L. Ed. l.c. 1066:

"The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state, used and employed for public and governmental purposes.

Upon the facts shown, the Queen City is exempt, and the prohibition should be issued."

See also the following cases:

State of Missouri v. *Fiske*, 290 U.S. 18, 78 L. Ed. 145.
Delaware River Joint Toll Bridge Commission v. *Colburn*, 310 U.S. 419, 84 L. Ed. 1287.
United States v. *McCarl*, 275 U.S. 1, 72 L. Ed. 131.
Johnson v. *United States Shipping Board*, 280 U.S. 320, 74 L. Ed. 451.

VI.

Eleventh Amendment Deprives Federal Court of Jurisdiction.

Amendment Number XI of the Constitution of the United States provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

It has uniformly been held that Federal Judicial power does not extend to any suit in law or equity against a state by citizens of another state even in cases arising under the Constitution or Laws of the United States. *Missouri* v. *Fiske*, 290 U.S. 18, 78 L. Ed. 145. This Amendment does not by its terms bar a citizen from suing his own state. However, this court has held that a state cannot be sued without its consent in a Federal Court by one of its own citizens. *Hans* v. *State of Louisiana*, 134 U.S. 1, 33 L. Ed. 842. The decision in the Hans case was recognized as properly stating the law in *Georgia Railroad and Banking Company* v. *Redwine*, 342 U.S. 299, 96 L. Ed. 335. See also *Great Northern Life Insurance Company* v. *Read*, 322 U.S. 47, 88 L. Ed. 1121; *Ford Motor Company* v. *Department of Treasury of the State of Indiana*, 323 U.S. 459, 89 L. Ed. 389;

Walker v. *Felmont Oil Corporation*, 240 F. 2d 912 (6th Cir.).

VII.

Petitioner in her brief, pages 14-17, relies heavily on *United States* v. *California*, 297 U.S. 175, 80 L. Ed. 567. That was a proceeding by the United States to collect a penalty for violation of the Safety Appliance Act. That decision cannot be controlling here because the Eleventh Amendment to the Constitution of the United States does not prohibit the United States from instituting suits in the Federal Courts. The action at bar is being prosecuted by an individual, and such an individual is precluded from instituting this suit against the respondent, which is an agency of the states performing a governmental function.

CONCLUSION.

For the reasons hereinabove given Respondent prays that the decision of the lower courts in this case be permitted to stand.

Respectfully submitted,

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